



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

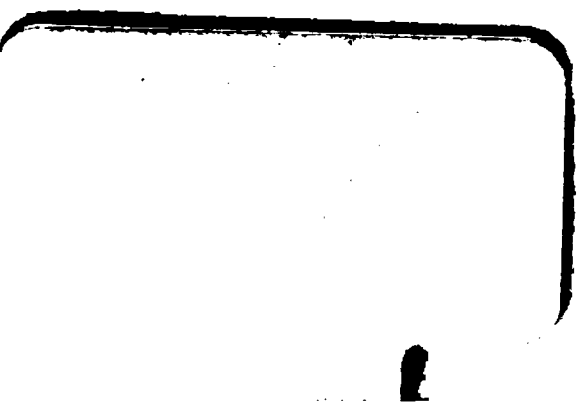
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>







Samuel Johnson  
P. 1. 1. 1. 1. 1. 1.



THE  
**LAW MAGAZINE;**

OR

QUARTERLY REVIEW

OF

JURISPRUDENCE,

FOR AUGUST, 1833; AND NOVEMBER, 1833.

VOL. X.

---

LONDON:  
SAUNDERS AND BENNING, LAW BOOKSELLERS,  
(SUCCESSORS TO J. BUTTERWORTH AND SON,)  
43, FLEET STREET.

---

1833.

LIBRARY OF THE  
STANFORD, JR. UNIVERSITY  
DEPARTMENT

59,102

# CONTENTS.

---

	Page.
<b>ART. I.—FOURTH REPORT OF THE REAL PROPERTY COMMISSIONERS.</b>	
Copy of the Fourth Report made to his Majesty by the Commissioners appointed to inquire into the Law of England respecting Real Property. Presented pursuant to an Address dated 19th April, 1833. Ordered by the House of Commons to be printed, 25th April, 1833 . . . . .	1
<b>ART. II.—LIFE OF LORD COWPER . . . . .</b>	<b>43</b>
<b>ART. III.—LAW OF HOMICIDE—THE SPA FIELDS VERDICT .</b>	<b>79</b>
<b>ART. IV.—ON THE VESTING OF ESTATES . . . . .</b>	<b>96</b>
<b>ART. V.—PRESCRIPTION AND CUSTOM. (2 &amp; 3 Wm. 4, c. 71.)</b>	<b>103</b>
 <b>ART. VI.—AMERICAN PENITENTIARY SYSTEM.</b>	
Du Système Pénitentiare aux Etats-unis, et de son Application en France: Suivi d'un Appendice sur les Colonies Pénales et de Notes Statistiques. (Par MM. G. de Beaumont et A. de Tocqueville, Avocats à la Cour Royale de Paris, Membres de la Société Historique de Pennsylvanie) . . . . .	113
 <b>ART. VII.—CHITTY'S PRACTICE OF THE LAW.</b>	
The Practice of the Law in all its Departments; with a view of Rights, Injuries, and Remedies, as ameliorated by Recent Statutes, Rules and Decisions; showing the best modes of creating, perfecting, securing, and transferring Rights; and the best Remedies for every Injury,	

as well by acts of parties themselves as by legal proceedings; and either to prevent or remove Injuries, or to enforce specific Relief or Performance, or Compensation; and showing the Practice in Arbitrations; before Justices; in Courts of Common Law, Equity, Ecclesiastical and Spiritual, Admiralty, and Courts of Appeal. With new Practical Forms. Intended as a Court and Circuit Companion.—In two Volumes. Vol. I. Parts I. and II.—By JOSEPH CHITTY, Esq., of the Middle Temple, Barrister . . . . . 139

**ART. VIII.—NEW POINTS OF ELECTION LAW.**

1. Cases of Controverted Elections, &c. By Henry James Perry, Esq. M.A. and Jerome William Knapp, Esq. D.C.L. Part I. and Part II.
2. Cases of Controverted Elections, &c. By A. E. Cockburn, Esq. and W. Carpenter Rowe, Esq. Part I. 146

**ART. IX.—FIFTH REPORT OF THE COMMON LAW COMMISSIONERS.—LOCAL COURTS.**

Copy of the Fifth Report made to his Majesty, by the Commissioners appointed to inquire into the Practice and Proceedings of the Superior Courts of Common Law. Presented Pursuant to an Address, dated 2d May, 1833. Ordered by the House of Commons to be printed 3d May, 1833 . . . . . 162

**DIGEST OF CASES.**

Common Law. . . . .	189
Equity. . . . .	224
Bankruptcy . . . . .	228
List of Cases. . . . .	239

ABSTRACT OF PUBLIC GENERAL STATUTES . . . . .	248
Events of the Quarter . . . . .	252
Notice to Correspondents . . . . .	253
List of New Publications. . . . .	254



# CONTENTS.

---

	Page.
<b>ART. I.—OLD BAILEY EXPERIENCE.</b>	
Old Bailey Experience.—Criminal Jurisprudence and the actual working of our Penal Code of Laws.—Also an Essay on Prison Discipline ; to which is added a History of the Crimes committed by Offenders in the present day. By the Author of “ The Schoolmaster’s Experience in Newgate.” . . . . .	259
<b>ART. II.—LIFE OF LORD HARCOURT</b> . . . . .	296
<b>ART. III.—THE JUDGMENTS OF SIR GEORGE LEE.</b>	
Reports of Cases argued and determined in the Arches and Prerogative Courts of Canterbury, and in the High Court of Delegates, containing the Judgments of the Right Honourable Sir George Lee. By Joseph Phillimore, LL.D. 2 Vols. . . . .	327
<b>ART. IV.—ON COVENANTS WHICH RUN WITH THE LAND</b> . .	342
<b>ART. V.—THE ACT FOR THE LIMITATION OF ACTIONS AND SUITS RELATING TO REAL PROPERTY. (3 &amp; 4 Wm. 4, c. 27.—Royal Assent, 24th July 1833.)</b> . . . . .	357
<b>ART. VI.—THE LAW OF DUELLING</b> . . . . .	367
<b>ART. VII.—GERMAN CRIMINAL TRIALS—(continued).</b>	
Aktenmässige Darstellung merkwürdiger Verbrechen, von Anselm Ritter von Feuerbach, Staatsrath und Präsidenten ; Zweiter Band.—(Documentary Exposition of Remarkable Crimes, by Anselm von Feuerbach, Knight, Counsellor of State and President. Second Volume.)	385

	Page.
<b>DIGEST OF CASES.</b>	
Common Law. . . . .	404
Equity. . . . .	427
Bankruptcy . . . . .	434
List of Cases. . . . .	440
 <b>ABSTRACT OF PUBLIC GENERAL STATUTES . . . . .</b>	 447
 <b>Criminal Law Commission . . . . .</b>	 483
<b>Notice of the Life of Sir Christopher Robinson . . . . .</b>	<b>485</b>
<b>Events of the Quarter . . . . .</b>	<b>489</b>
<b>Notice to Correspondents . . . . .</b>	<b>494</b>
<b>List of New Publications. . . . .</b>	<b>495</b>
<b>Index . . . . .</b>	<b>497</b>

# THE LAW MAGAZINE.

---

## ART. I.—FOURTH REPORT OF THE REAL PROPERTY COMMISSIONERS.

---

*Copy of the Fourth Report made to his Majesty by the Commissioners appointed to inquire into the Law of England respecting Real Property. Presented pursuant to an Address dated 19th April, 1833. Ordered by the House of Commons to be printed, 25th April, 1833.*

THIS is one of the most important and best executed Reports that has yet emanated from either set of Commissioners. It contains the best account of the history and present state of the law relating to wills now extant, and thus, besides answering the more immediate purpose of a Report, may really serve for some time to come as a text-book for the instruction of the practitioner.

Sir Matthew Hale, in his Treatise on enrolling and registering Conveyances, remarks, that “since the Statute of Wills, more questions, not only of law touching the construction of wills, but also of facts, arise, than in any other five general titles or concerns of the law besides.” According to the Commissioners, very little improvement has since been made in this particular. Wills (say they) occasion a large proportion of the doubts and difficulties which arise upon titles, and are the most frequent source of litigation respecting Real Property. These evils are described as mainly attributable to the informal manner in which wills are frequently expressed; and it has been suggested that the strict rules by which the language of deeds is interpreted, should therefore be extended

## **2 *Fourth Report of the Real Property Commissioners.***

to wills. To this it is very properly objected, that wills are so often made under circumstances which render professional assistance unattainable, that the intentions of testators would be continually frustrated were any such suggestions to be acted upon. The great object, in the Commissioners' opinion, is to make the rules respecting wills as uniform and simple as possible, so that they may be generally understood. "At present, independently of the construction of wills, there is no legal instrument, the validity and effect of which, as respects various descriptions of property, depend upon so many different rules, or are involved in so many technical and complicated descriptions." "This (continues the Report) has arisen from the various modes in which, at different times, the power of testamentary disposition over the several kinds of property was established: and we think that the rules we have to consider can best be explained by a statement of the manner in which such power of testamentary disposition was acquired, or has been exercised, with respect to each of the several kinds of property."

They propose to consider the different rules relating to wills:—

- " 1. As to the mode of their execution.
- " 2. As to the persons by whom they may be made.
- " 3. As to the property which may pass by them.
- " 4. As to the time from which they take effect.
- " 5. As to their revocation.
- " 6. As to their republication; and,
- " 7. As to their proof or probate.

"And we shall afterwards suggest some alterations in certain rules connected with wills, respecting the circumstances which render void a devise of land; the assent necessary for giving effect to a legacy; and the office of executor or administrator."

1. *As to the Mode of Execution.*—Under this head they pass in review the several modes now employed according to the nature of the property. The result of the examination, through which we do not think it necessary to follow them, is thus given by themselves:—

"It appears from the preceding statement, that there are ten different laws for regulating the execution of wills under different circumstances. 1st. To pass freehold estates in fee-

simple by direct devise, either at law or in equity, or to pass equitable estates in such customary freeholds as are not devisable at law, the will must be in writing, and signed and attested in the manner required by the Statute of Frauds. 2d. To pass leasehold estates, money secured on land, or personal property exceeding the value of 30*l.* and belonging to any person other than a soldier in service, or a sailor at sea, any writing, however informal, is sufficient; or such property may pass by parol in certain cases, with the evidence required by the statute. 3d. Such property when not exceeding in value 30*l.* and also any property belonging to a soldier in service, or a sailor at sea, whatever may be its value, with the exception of the pay, prize money, &c. of a seaman in the navy, or marine, may pass by parol without any restriction as to evidence. 4th. To pass the pay, prize-money, &c. of a warrant officer or seaman in the navy, or non-commissioned officer of marines, or marine, the forms required by the statute 11 Geo. IV. and 1 Will. IV. c. 20, must be complied with. 5th. To pass freehold estates *pur autre vie* at law, the will must be executed in the same manner as wills of estates in fee-simple; but such property will pass in equity, unless the heir be special occupant, by a will in a form sufficient for personal property. 6th. To pass money in the funds by direct legal devise, the will must be attested by two witnesses; but such provision is almost nugatory. 7th. Copyholds may pass both at law and in equity, by a will in a form sufficient to pass personalty, and perhaps, without any restriction as to value, in certain cases, by parol. 8th. Such customary freeholds as will pass by surrender to the use of a will, cannot, it is thought, be devised at law without a surrender; but equitable estates in customary freeholds so devisable, may be devised in the same manner as equitable estates in copyholds. 9th. To appoint a guardian, a will must be attested by two witnesses. And, 10th. To exercise a power of appointment by will, it is necessary to comply with any forms which may be required by the terms of the power."

This great variety of rules has been productive of the most striking inconveniences. It cannot be expected that unlearned persons should keep minute legal distinctions in mind, nor, as already stated, is a lawyer always at hand when a testamentary

#### **4 *Fourth Report of the Real Property Commissioners.***

paper is required. The consequence is, that wills are continually rendered invalid for informality, and (what the Commissioners state to be perhaps a still more serious evil) wills are not unfrequently good as to part of the property and bad as to the rest. When this happens, the party taking under the valid bequest generally comes in for a share of the property as to which the testator's intention has been frustrated, and thus a greater inequality may be produced than if the whole will had been declared inoperative.

The question then arises whether there be any good reason for these distinctions. In the Commissioners' opinion there is none. "All wills (say they) are open to the same danger of forgery and fraud, and their genuineness depends on the same circumstances. A will of land is not more liable to forgery or fraud than a will of money. If there should be any difference, wills of personal property perhaps ought to have the greatest protection, for they offer a stronger temptation to forgery and fraud, because money can be made away with more easily than land; and wills of land ought to be less encumbered with forms, because the consequences of any omission or mistake in the mode of execution are usually more inconvenient than they would be as to personal property. If the will is void with respect to the personal property, such property is liable to the demands of creditors, and the surplus is divided among the next of kin; but with respect to freehold property, the creditors have no claim, and every one, except the heir, is left unprovided for."

Whatever, again, might have been the case formerly, personal property is now as valuable as real, and estates in fee-simple no longer retain their ancient extent of superiority over copyholds and terms. And here a source of confusion is alluded to, which perhaps had better have been mentioned amongst or at the end of the before-mentioned varieties:

"At present a will, to pass the same property under different circumstances, requires to be executed in a different manner. In consequence of the rule of equity, that what ought to be done is considered to have been done; land, which has been agreed, or directed, by any deed or will, to be sold, is considered as money; and money, which has been agreed, or directed, to be laid out in the purchase of land, is

considered as land; therefore, money which has been directed to be laid out in the purchase of land, will not pass by will, unless it is executed as if the property were land; and land which has been directed to be converted into money, will pass by any will sufficient to pass money."

We need hardly add that questions of great difficulty arise as to whether money is to be considered as land, or land as money, and, consequently, by what description of will such land or money may pass. Taking these several matters into consideration, the Commissioners think it of great importance that, as a general rule, wills of every description should be required to be executed according to one simple form. In order to determine what this form should be, they have carefully weighed the advantages and disadvantages of the various forms now followed with relation to wills.

"It has been observed by great authorities on the one hand, that the solemnities required by the Statute of Frauds, for the validity of wills of real estate, are too indefinite and complicated; and on the other, that wills of personalty and of copyhold estates, are allowed to be made in too informal a manner."

The Commissioners are for holding a middle course between the strictness of the Statute of Frauds and the laxity of the practice as to personalty and copyholds. They propose that wills should be required to be in writing, and that the signature or mark of the testator should be subscribed. Some doubt appears to have existed as to whether a signature or mark at the foot of the testamentary instrument ought to be declared necessary, or whether it should be sufficient for the name of the testator (in his own handwriting, we suppose,) to appear in another part of the document. The Commissioners decide in favour of a mark or signature at the foot, and, in our opinion, very properly, for nothing is more common than for a man to write out instruments of all kinds ready to be executed, and suspend the actual signature under the impression that the instrument will remain inoperative till signed. The next points are, whether any attestation by witnesses should be required, and if so, by how many and what witnesses. The common practice of society is cited in proof of the expediency of attestation, and there can be no doubt



that a will is the instrument of all others in which this sort of protection against fraud is desirable. Deeds have generally several parties, and are liable to be acted upon during the life-time of some one of these; whereas a will has but one party, and can never be brought into action until that party is no more.

“Forgery,” add the Commissioners, “is not the only, nor by much the most usual, question affecting the validity of a will. The incapacity of the testator, or the circumstances of fraud or coercion under which a false will may have been obtained, and which may be attempted to be disproved by perjury, render the validity of a will one of the most complicated and perplexing subjects of litigation, and make it particularly necessary to require the protection of attesting witnesses. The attestation of witnesses secures their direct testimony in favour of the will as long as they live, and in case of their deaths affords the security of their handwriting. We are sensible that this protection is abridged by the cases deciding that a witness to a will need not be informed of the nature of the instrument he attests, but we are unwilling, by altering the law in this respect, to add to the chances of mistake in executing wills, and to impose on purchasers the necessity for inquiry as to a circumstance necessarily difficult of proof.

“These considerations induce us to recommend that every will shall be attested, and we think it expedient and sufficient to require two witnesses.

“Where more than one witness is required, there is the greater probability that a witness will be living at the death of the testator, and a greater difficulty is opposed to the fabrication of a will. If a will be forged, the same person may write the false will and affix his own signature as a witness. The protection against forgery is greatly increased by requiring a second witness, on account of the difficulty of engaging an accomplice, the necessity of rewarding him, and the danger to be apprehended from his giving information, or not being able to elude a discovery of the fraud by a searching cross-examination.”

The next consideration is the manner in which the will is to be attested. By the Statute of Frauds under the some-

what lax interpretation of the courts, it is not requisite that the witnesses should attest in the presence of each other, or that they should be seen by each other at all. This clearly weakens the security afforded by attestations, and the Commissioners propose that the witnesses should subscribe in the presence of each other, or that one, having signed first, should acknowledge his signature and be present when the attestation is signed by the other. On the other hand, they think the Statute of Frauds overstrict in requiring the witnesses to subscribe in the actual presence of the testator. They think it should be sufficient for the attestation to form part of the same transaction as the execution of the will. They propose continuing so much of the present law as renders it unnecessary to state in the attestation that the forms have been complied with, and also to admit the evidence of attesting witnesses to be contradicted by other witnesses as now. They next proceed to consider the qualification of attesting witnesses.

“ The Statute of Frauds requires ‘ credible ’ witnesses; and upon that expression several questions have arisen. 1st. What is meant by credible witnesses? 2d. Whether, if not credible at the time of the execution of the will, they can become credible by any subsequent occurrence? And, 3d. Whether witnesses, who are not credible on account of their having interests given to them by the will, are credible witnesses to support the will for the benefit of other parties.”

These questions have occasioned considerable litigation, and some of them are still undecided. The law upon the subject has been objected to upon general grounds; and it has been suggested that much injustice might be prevented by an enactment, that a will should not be void by reason of any interest or want of legal credibility of the witnesses, but that it should be left to the jury to say whether they believed the witnesses’ account of the transaction or not. The argument on which this suggestion is based is merely an application of the principle on which the disciples of the late Mr. Bentham object to all rules of evidence of a generally exclusive character. The Commissioners therefore simply reply—

“ We do not feel ourselves at liberty to suggest alterations in the general rules of evidence, and see no sufficient reason

## 8 *Fourth Report of the Real Property Commissioners.*

for making the case of wills an exception to those rules. These reasons induce us to propose, in conformity with the Statute of Frauds, that the witnesses should be required to be credible persons, and that gifts to them should be void according to the provisions of the statute 25 Geo. 2, c. 6."

It has been thought that publication is at present necessary, but that it may be inferred from the delivery of the will as a deed.<sup>1</sup> Admitting that, when an instrument is not attested, there may be a doubt whether it is finally determined on as complete, the Commissioners consider the act of signing or acknowledging in the presence of witnesses to be publication enough. They accordingly pronounce any further publication to be unnecessary.

The only remaining topic of consideration under this head is, whether any exceptions should be made to the general rule proposed. Blackstone remarks, that the legislature has provided against fraud in setting up nuncupative wills by so numerous a train of requisites, that the thing itself has fallen into disuse, and is hardly ever heard of. The Commissioners do not seem to think that this result is much to be regretted. If, on the one hand, the exclusion of nuncupative wills will sometimes prevent a person dying suddenly from making one, it must be remembered, on the other hand, that the admission of nuncupative wills would pave the way for a multitude of frauds on the part of strangers, much more likely to divert the property from its proper direction than occasional intestacy. The only exception, therefore, that they consent to admit is one in favour of soldiers and sailors; and strong arguments might be suggested against this, for though military men are more liable to sudden death, they are fully aware of their liability, and might without difficulty provide against it. "We are not disposed (it is added) to extend this exception to freehold or copyhold estates." We take down the concluding paragraphs of this section as they stand:

"It is also necessary to consider whether there are any cases in which formalities beyond those required by the general rule, may advantageously be made essential to the validity of wills.

<sup>1</sup> *Ross v. Ewer*, 3 Atk. 156.

“ Although not within the object of our commission, we may take the liberty of noticing, that we think the wills of warrant officers and seamen in the navy, and non-commissioned officers of marines, and marines, with respect to their wages, prize-money, &c. require additional protection, because they are peculiarly liable to forgery and fraud; and therefore we do not recommend that the restrictions required by the statutes 11 Geo. IV. and 1 Will. IV. c. 20, should be discontinued.

“ Although wills made in the execution of powers are now liable to be burthened with all such formalities and conditions as the person by whom the power is created may require, yet in most cases such formalities are required only in consequence of the present state of the law, which, when no solemnities are mentioned, allows a power not relating to freehold estate to be exercised by a will in any form. If wills in exercise of powers were required to be made in the same manner as other wills, we are not aware of any practical advantage which would arise from allowing any other solemnities to be imposed, and it is of great importance to prevent the litigation occasioned by questions whether the particular solemnities required by the power have been duly complied with. We therefore recommend that the general rule should extend to all wills made in exercise of powers; and that the direction of any additional formalities, with respect to the mode of execution, should be invalid.”

*2. As to the Persons by whom Wills may be made.*—The proposition under this head cannot well be stated in fewer words than in the Report:—

“ Another difference in the laws relating to wills, with respect to different descriptions of property, relates to the capacity of the persons by whom they are made. Persons under the age of twenty-one years, and married women, cannot devise freehold estates by force of the Statute of Wills. By the customs of particular places, infants and married women may devise their freehold estates. Wills of leasehold estates and other personal property may be made by boys of fourteen years of age, and by girls of twelve. In general, copyholds and customary freeholds cannot be surrendered or

## 10 *Fourth Report of the Real Property Commissioners.*

devised by persons under the age of twenty-one years; but by the customs of some manors they may be devised by infants.

“It appears to us that all these distinctions should be abolished. We see no reason for any exception to the rule of law, which, for the protection of minors, renders them incapable of making any disposition or contract. And we therefore propose that no person under the age of twenty-one years shall be capable of making a will; and that no married woman shall be capable of making a will, unless in exercise of a power, or, as to personal property, with the assent of her husband; or, where she is executrix, so far as to appoint an executor of the will of her testator.”

3. *As to the Property which may be passed by Wills.*—At present all freehold estates are directly devisable, except estates in joint tenancy or in tail; and these may be rendered devisable by first severing the joint tenancy or cutting off the entail. It appears to have been suggested to the Commissioners to allow joint tenants and tenants in tail to do directly what is thus effected by a circuitous process; but they object to the alteration, on the ground that questions would otherwise arise whether general devises were intended to include such estates, and that expense and embarrassment would be occasioned by the necessity of inquiring whether a tenant in tail had died intestate. The only alterations they propose are, that estates *pur autre vie* in copyholds where there is no special occupant, the estate of a surrenderee or devisee before admission, and every other interest exceeding the life of the owner not now devisable, should be made so. In their Third Report (p. 22) they had already recommended that copyholds and customary freeholds should be rendered directly devisable. In that Report also (p. 69) they had recommended that contingent, executory and other future estates and interests and several rights should be devisable; and they now recommend that the same privilege shall be extended to rights of entry.

4. *As to the Time from which Wills take effect.*—It is a singular part of the law of wills, that they affect no freehold estate but such as the testator is entitled to at the time of making the will; not even when the devise is in terms extended to all the lands of which he may be seised at the time

of his death. The highest authorities differ as to the origin of this rule. It has been attributed by Lord Coke to the word "having" in the Statute of Wills; by Lord Chief Justice Trevor, to a design of the legislature, in passing the Statute of Wills, to give a power of disposition similar to that which had been taken away by the Statute of Uses; and by Lord Mansfield, to a devise being in the nature of a conveyance by way of appointment of particular lands to a particular devisee.

The rule is peculiar to the law of England, and does not extend to personal property, which passes by a will made prior to the acquisition of it. Copyholds stand strictly on the same footing as freeholds in this respect; but they may be surrendered to the use of a prior will, in which case the surrender operates as a republication of the will. There is a strange difference resulting from this rule between renewable freeholds for lives and renewable terms of years determinable on lives; the latter will pass by a prior will, whilst the former will not. Here, therefore, the Commissioners conceive a change to be necessary:

"The rule, that freehold and copyhold estates acquired after the date of the will cannot pass by it, is attended with several inconveniences. It renders it necessary for a testator to republish his will, or to make a new one as often as he acquires other property. It prevents (except in a few cases in equity) a devise from taking effect, if a testator makes any alteration in his estate, or does any act which prevents the interest in it, to which he is entitled at the date of his will, from continuing unaltered until his death. It creates many nice and unnecessary questions in the laws relating to the revocation of wills; it frequently defeats the intention of the testator, and has been disapproved of by eminent judges. The usual intention of the testator is to dispose, not of the property which he has when he makes his will, but of the property which he may have at his death; and if wills were to be construed with reference to the property comprised in them, both real and personal, as speaking at the testator's death, unless a contrary intention appears, the rule would get rid of the greatest part of the intricate laws relating to revocation and republication.

“ We therefore propose that a will shall pass property of any description comprised in its terms, which a testator may be entitled to at the time of his death, unless an intèntion to the contrary shall appear upon the will. If this recommendation be adopted, the law respecting the time from which a devise of freehold or copyhold estates is to be considered to take effect, will be precisely similar to that which is at present in force as to personal estate; and there will be one uniform rule in this respect applicable to wills of property of every description.”

5. *As to the Revocation of Wills.*—Under this head a full account is given of all existing modes of revocation as to all descriptions of property.

The revocation of wills affecting freehold estates is principally regulated by the Statute of Frauds, which enacts, “ That no devise of lands shall be revocable, otherwise than by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; or, by the burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, or by his direction and consent.”

The last-mentioned acts are not conclusive of an intention to revoke; they are considered to afford only presumptive evidence of such an intention, and may be rebutted by evidence that they were done under an erroneous impression or in sport. It has also been determined that a testator may cancel his will in part by obliterating some of the devises; a power which is said to lead to many practical inconveniences. Thus when the gift of a particular estate is obliterated, it is doubtful whether the remainder is accelerated or whether the particular estate descends to the heir. Sometimes, again, testators alter their wills without republishing them. In these cases the new gifts of freehold estates are void for want of attestation; and a question arises whether the gifts which have been cancelled or obliterated are revoked.<sup>1</sup> Besides the modes of revocation mentioned in the statute, a revocation may be implied from certain circumstances, on the ground that they afford evidence of a change in the intention of the testator. Thus,

<sup>1</sup> And see *Short v. Smith*, 4 East, 419.



if the testator dispose, wholly or in part, of the property, the devise is necessarily wholly or *pro tanto* revoked. This species of revocation is inherent in the very nature of a testamentary gift, but there are others of a technical sort which are constantly counteracting intention, and which, consequently, it is thought necessary to change. First and foremost amongst these are the revocations resulting from the rule, that a devise shall not take effect unless the estate (in the technical sense of the term) which the testator was entitled to when he made his will, continues unaltered until his death. Thus a feoffment or any other conveyance to the use of himself or where the use results to him, or a fine or recovery to strengthen his title, or even made expressly to give effect to his will, will operate as a revocation of it. This effect, though to be deprecated, is still a natural consequence of the rule; but the courts have gone the length of declaring that an act merely evidencing an intention to alter the estate, as a feoffment without livery, or a bargain and sale without enrolment, shall operate as a revocation; and for this class of cases, as the Commissioners observe, no plausible justification can be suggested. The will of a woman is also revoked by her subsequent marriage; and the will of a man may be revoked by his subsequent marriage and the birth of a child. In the latter case it is still a matter of doubt whether parol evidence of intention is admissible in support of the will; but evidence of circumstances, showing the revocation to be unnecessary, has been admitted, and has been made the foundation of several exceptions to the rule.<sup>1</sup>

Wills as to personalty may be revoked either expressly or impliedly, much in the same manner as wills of realty. They are not, however, revoked by a mere alteration or intended alteration of the estate; for instance, a renewed lease may pass by a will made prior to the renewal; but, on the other hand, implication has been occasionally carried further with regard to them, as in the case deciding that the birth of

<sup>1</sup> The following cases are referred to in the Report:—*Kenebel v. Scrafton*, 2 East, 541; *Brown v. Thompson*, 1 Eq. Ca. Abr. 413; *Ex parte Ilchester*, 7 Ves. 348; *Brady v. Cubitt*, Doug. 31; *Sheath v. York*, 1 Ves. & B. 413; *Gibbon v. Caunt*, 4 Ves. 849.

#### 14 *Fourth Report of the Real Property Commissioners.*

children and other circumstances, though without any subsequent marriage, may afford sufficient ground for the revocation.

The only distinguishing particular with regard to *Estates pur autre vie*, is the doubt whether the sixth section of the Statute of Frauds, regulating revocations, extends to them. This section clearly does not extend to copyholds or customary estates; therefore wills, with respect to such property, may be revoked by parol, as also may a testamentary appointment of a guardian. The revocation of appointments by will is governed by the same rules as the revocation of other rules with respect to the same description of property.

It thus appears that the rules relating to the revocation are little less various than the rules relating to the execution of wills, and the Commissioners conceive variety to be equally injurious in both cases. They therefore first propose that all wills shall be revocable in the same manner, whatever the description of property to be affected by them. Their next proposal is, that no will shall be *expressly* revoked otherwise than by another inconsistent will or codicil; nor *impliedly*, otherwise than by burning, cancelling, tearing or obliterating, with the intention to revoke, by the testator, or in his presence and by his direction. They object to the present law which allows a will to be partially revoked by unattested obliterations, upon the ground of the facility with which the family of a testator, usually his residuary legatees and in possession of the will, may pass a pen over some of the legacies or devises.

“ It therefore appears to us that it would be most convenient and safe to enact, that where a will is found with unattested obliterations, it should be considered to be wholly unaltered, except that if any words cannot be read nor made out in evidence in consequence of the obliterations, the will shall take effect as if such words did not form part of it.”

If, as already proposed, testators shall be empowered to devise subsequently acquired estates, constructive revocations on the ground of an alteration of estate will necessarily be at an end; but to prevent any doubts upon the points connected with the present rule, it is proposed to enact—

“ That no act done by the testator subsequently to his will, with respect to any of the property comprised in it, shall operate as a revocation of the gift of the same property, ex-

cept so far as a beneficial interest is thereby conferred upon another person, or as an intention that such act shall operate as a revocation shall appear from the will."

They think that the law which makes the marriage of a woman a revocation of her will, should be continued, and that the will should not be revived by the subsequent death of her husband in her life-time. But they propose abolishing the mode of revocation implied from the marriage of a man followed by the birth of a child. As this is a subject on which some doubt may exist, we shall state the argument for the alteration at length:—

"The numerous exceptions which have been made to the rule, that the will of a man shall be revoked by his subsequent marriage and the birth of a child, and the variety of doubts and consequent litigation which have arisen from it, prove that it is attended with considerable inconvenience. Great trouble and expense in the investigation of titles are produced by it, because it renders necessary inquiries and evidence on every sale or mortgage of any real or leasehold estate, where the title is traced through a will, and it is possible that the testator may have married and had a child subsequently to the making of it; and where erroneous information is obtained, the title is rendered unsafe.

"If the hardship arising in individual cases, from the neglect of testators to alter their wills, is a sufficient reason for the continuance of the rule, the same principle would afford ground for extending it. In some cases of marriage without children, and in others of children without any new marriage, more hardship is occasioned in consequence of leaving a will unaltered, than in other cases in which there are both the circumstances of marriage and the birth of children. In many cases, intestacy is equally prejudicial; and yet the law cannot supply the want of a will. It appears to us, that the law having entrusted to every man a power of testamentary disposition over his property, must rely upon its being exercised according to the testator's intentions; and that no will ought to be set aside on conjectures respecting what the testator's intentions may have been in consequence of a change of circumstances. It may safely be asserted, that the present law is not relied upon in practice; for no one neglects to cancel

or alter his will, because he knows that his marriage and the birth of a child will have the effect of revoking it. The numerous exceptions which have been admitted, prove that there are many cases in which it is expedient that, notwithstanding the marriage and birth of a child, the will should remain unrevoked; and there are probably cases, not within any of the exceptions, in which proper and equitable wills have been revoked by the present law, contrary to the intention of the testators. We believe that the inconveniences of the rule preponderate over its advantages, and we therefore recommend that it should be abolished."

We must own that we are not perfectly convinced by this reasoning. The subject will no doubt be simplified and a good deal of doubt be done away by the proposed amendment, but simplicity and certainty are almost always obtainable, if we are content to sacrifice the nicer shades of equity. And here it is not merely the nicer shades that are to be sacrificed; for we can hardly conceive a greater case of hardship than might occur in the absence of all such power of implication as is now exercised by the courts. For instance, a man makes his will and distributes his property amongst his nearest relations, as nephews or nieces, at the time; he subsequently marries and has children, but dies without formally cancelling the will or making a new one. In such a case it is impossible to doubt that the omission to cancel the will must be exclusively attributable to forgetfulness and that the man died intestate as far as intention is concerned. It may be admitted that cases of hardship are frequently occurring under the law as it stands; but this is no argument for admitting a new and still more startling one. The effect of the alterations proposed under this head is thus summed up in the Report:—

"If the alterations we have proposed with respect to the revocation of wills be carried into effect, the laws relating to it, which at present are so complicated and incongruous, will be reduced to a few very simple rules, applicable to wills of every description. There will be only four modes in which any will can be revoked:—1st. By another inconsistent will or writing, executed in the same manner as the original will; 2d. By cancellation, or any other act of the same nature; 3d. By the disposition of the property by the testator in his lifetime; and,

4th. In the case of a woman, by marriage. By the first and third of these modes, the will may be revoked either entirely or in part; by the second and last, the revocation will be complete."

*As to the Republication of Wills.*—Republication gives to the will the same effect as it would have had if made at the date of the republication, or revives and makes valid a will which has been revoked or become void. Previously to the Statute of Frauds any will might be republished by a mere parol declaration, but since that statute a will relating to freehold estate cannot be republished otherwise than by formal re-execution or by a codicil executed with the same formalities as a will. The question, whether a will is republished by a codicil, which does not expressly republish or confirm it, has occasioned much litigation; but it is now settled that the will is republished by any codicil duly executed, unless a contrary intention appear. A will, as regards personal or copyhold estate, may be republished by parol; and very slight expressions are said to have been held sufficient.<sup>1</sup>

The Commissioners think, that, as *publication* is to be declared unnecessary, the expression *republication* may also be dropped. They propose that no will shall be revived or made to speak as from a subsequent date, except by re-execution, or by a codicil expressly showing an intention to revive or confirm the will. "The only exception we think necessary to this rule is, where a will, which has been wholly or partially revoked by a subsequent will or codicil, is left perfect, and a subsequent will or codicil is cancelled or otherwise destroyed. If this exception were not allowed, wills might be defeated by parol evidence that subsequent wills had been made and destroyed."

7. *As to the Proof or Probate of Wills.*—This is a very important section; the question involved in it being neither more nor less than whether the spiritual courts shall be deprived of the principal part of their jurisdiction and be virtually reduced to nonentities or not. This question is most elaborately discussed; but our review of the Ecclesiastical Report (7 L. M. 263) will justify us in being comparatively

<sup>1</sup> The Commissioners cite *Long v. Aldred*, 3 Add. Ecc. Rep. 48.

## 18 *Fourth Report of the Real Property Commissioners*

brief, as we there condensed much of the same sort of information as the Real Property Commissioners are here anxious to convey.

They first set forth the law relating to the proof of wills affecting freehold estates in fee-simple; the apparent object being, to show that parties interested have at present no means afforded them of bringing the validity of a will to an immediate determination. It is sufficient for our present purpose to quote their general conclusion:

“ From the preceding statement it will appear that titles to freehold estates under wills are in general in no different situation from any other titles to real property, for no person can obtain any final decision in his favour, whether his title depends upon the validity of a will, or upon any other question, unless in a few cases in which real actions (which are nearly obsolete) can be brought, or where a court of equity will interfere for collateral purposes, or may think proper, after much litigation, to grant an injunction for peace.”

The general conclusion drawn from nearly the same premises by the Ecclesiastical Commissioners, which it may be as well to compare, is as follows:

“ Thus it appears from the preceding observations that there exist no direct means, applicable to all cases, of obtaining a final determination on the validity of a will devising real estates; that in some cases litigation may proceed to a vexatious extent before any remedy can be applied; and that the jurisdiction exercised by the Court of Chancery is not an original jurisdiction to determine or cause to be determined the validity of a will, but that its functions can only be called into exercise from the existence of a trust or some collateral matter of which it has cognizance. Whilst the validity of a title thus remains undecided, it appears obvious that inconvenience must ensue; for there must be difficulty in disposing of the property by sale, or charging it with incumbrances, and those having an interest therein cannot with security settle their affairs for the benefit of their family and connexions.”

A will, so far as relates to leasehold and other personal property, requires a species of authentication called probate, which it is the duty of the executor to procure. “ Such wills, with respect to personal property, cannot be disputed in any

court of law or equity. Those courts will not recognise a will until it has been authenticated by the court entitled to grant probate of it, and they receive the probate while unrevoked as conclusive evidence of the validity of the will. Therefore, whenever a will is to be given in evidence in any action or suit in reference to the title to personal property, it is necessary only to produce the probate.

“ In the Court of Probate, wills can be disputed only by persons who would be entitled to the property if the will were void; and when probate is granted in an adverse suit, and also when without any dispute it is granted after the will has been proved by the depositions of the witnesses, no subsequent attempt to impeach the validity of the will is admitted, at least by persons who were properly cited, or persons claiming under them.

“ The conclusive effect of the probate can be obviated in courts of common law or equity only by showing that the probate itself is forged, or that the court, by which it was granted, had not jurisdiction, or that the testator is living.”

There are two modes of proving wills in the spiritual courts; one in common form, and the other in solemn form. The evidence required for proving in common form is in the discretion of the court, and therefore varying. In the Prerogative Court of Canterbury, when the will is attested by two witnesses, and no objection appears upon the face of it, the oath of the executor is the only evidence required. The Stamp Act requires the executor to prove within a limited time, and also requires an affidavit of the value of the property to be made by him.

“ A will proved in common form may afterwards be disputed, as if no probate of it had been granted. It is said by text writers on the ecclesiastical law, that such a probate may be revoked at any time within thirty years; but the time of limitation, or whether there is any, appears not to be settled.”

When a will is proved in solemn form, the next of kin, or the persons entitled under another will suggested to the court, are cited to appear and see the will proved. The witnesses are then formally examined on written depositions, and may be cross-examined in like manner, on the part of the opposing



party, if required. If the evidence is satisfactory, probate is ordered by a sentence of the judge, which is conclusive against all persons properly cited. Proof by solemn form is said to be very rarely resorted to.

“ When a will is proved in a spiritual court, the original is deposited in the registry of the court, and a copy on parchment, with a certificate that the will has been proved annexed to it, under the seal of the court, is given to the executor. The copy, with the certificate, is called the probate.

“ Wills, with respect to estates *pur autre vie*, which pass to the devisee at law by a will duly attested, according to the Statute of Frauds, must be proved in like manner as wills of freehold estates in fee simple. When estates *pur autre vie*, not limited to the heirs as special occupants, pass at law to the executors or administrators, or in equity to the devisee under a will not attested so as to pass them at law, probate must be obtained of the will in the manner which is necessary with respect to personal estate.”

With regard to copyhold and customary freeholds, the Report runs as follows:

“ With respect to copyhold and customary estates, where it is necessary to give wills in evidence, the probates of them, granted by the spiritual courts, have usually been admitted as evidence of their authenticity; but if the evidence afforded by the probate is objected to, or if the will did not comprise any personal property, and therefore no probate has been obtained of it, the will must be proved in the same manner as a deed. In the last case it was referred to the master to ascertain the authenticity of the will.

“ Equitable interests in customary freeholds, which must be devised according to the Statute of Frauds, are not within the jurisdiction of the Court of Probate.”

Wills relating to the appointment of guardians, are not within the jurisdiction of the courts of probate. As to proof, they stand in the same predicament as deeds. Wills made in execution of powers do not require probate where the property is other than personal estate; and it was once thought that probate was unnecessary where the property is personal. It is now settled that probate is necessary in such instances; but (add the Commissioners) whether the power does or does not

require solemnities, the appointment must be proved in the courts of equity in the same manner as appointments by deed.

After stating the manner in which wills relating to different descriptions are to be proved, the Commissioners proceed to give a long and elaborate account of the courts in which the right of granting probate is vested. The variety and number (about 380) of these is sufficiently well known, as are also the inconveniences resulting from that number and variety.<sup>1</sup> In fact, so strangely mingled are these jurisdictions, that in many cases it is almost impossible to say to which of them application for probate must be made, whilst at the same time a mistake in this particular is fatal to the validity of the probate obtained.

“ Serious evils,” add the Commissioners, “ are occasioned by the existence of the numerous jurisdictions which we have described, in addition to the inconvenience arising from the frequent necessity of obtaining several probates of the same will.

“ The number of the courts, and the extent and nature of the jurisdiction of many of them, cannot be ascertained; the right to some is contested between superior and inferior, and between spiritual and lay parties. Many of them have not hesitated to grant probate of any wills which have been brought to them, without troubling themselves to inquire whether they were usurping a jurisdiction which did not belong to them.

“ There is no uniformity in the practice or rules by which the various courts are governed. Many of them are without competent judges and officers for the due administration of justice, and few have secure places for the custody of the important documents which they compel parties to deposit, and in many of them such documents have not been preserved except within a late period.”

So far as relates to probate the inconvenience of this variety of courts has been fully and freely admitted by the Ecclesiastical Commissioners, who, with a natural leaning towards the spiritual authorities, propose to transfer the whole testamentary jurisdiction, and the exclusive right of granting probates and administrations, to the archiepiscopal courts of the respective provinces. The Real Property Commissioners,

<sup>1</sup> See 7 L. M. 268, *et seq.*

however, contend that this remedy would be wholly inadequate, and that the spiritual courts must prepare to surrender the whole testamentary jurisdiction at once.

Along with the proposal contained in the Ecclesiastical Report is considered another proposal, to create a new court to exercise all such jurisdiction; and "with the suggestion for the establishment of one central court of probate (say the Commissioners) there have been combined two others, which it has been found difficult to separate from it; the first, a proposal to extend the practice of probate to wills of real property; and the second, a proposal to give to the central court of probate, concurrently with courts of equity, a general jurisdiction over all testamentary causes, including suits for administering the estates of testators, and for the recovery of legacies."

All these proposals are declined, for reasons which we shall briefly indicate, though not perhaps in the precise order in which they are set forth in the Report.

In the first place it is contended that no probate whatever is necessary, in the sense in which probate is at present understood; as its advantages exist principally, if not exclusively, with respect to probate in common form, and probate in common form is nothing more in effect than registration.

"It may be urged, that probate in a court would afford more security than registration for a due authentication of a will, but upon examination it will be found that this consideration is entitled to very little weight.

"Probate in common form, according to the present practice, is, as we have stated, granted where the names of two witnesses appear on the will, upon the oath of the executor, and where there are not two witnesses, upon proof by affidavit of the handwriting. Upon considering the subject of a general register of deeds, previous to making our Second Report, it was necessary for us to determine whether any authentication of the documents furnished for registration should be required. For the reasons which we stated in that Report, we came to the conclusion, that the mode of authentication required at the present local offices is useless; and that a perfect system of authentication would be attended with burthens which would overbalance its advantages. The same reasons appear to us to apply to the case now under consideration.

“ One of the reasons sometimes alleged for requiring probate in common form to be granted by a court, will be removed by the proposed alteration in the law for requiring wills of every description to be made in a formal manner.”

The executor's oath, it is added, must be retained, whether probate be continued or registration substituted for it, for the purposes of the stamp duty; and it is proposed that the oath should contain some particulars (see Prop. 17, *post*, p. 37) in addition to those now contained in it.

With respect to probate in solemn form, it is thought advisable to discontinue the present practice altogether. “ The advantages supposed to result from this form of proof (and which it has been proposed to extend to real estate) are; that to render the judgment of a competent court unappealed from, or the judgment of a court of appeal on the merits, after proper warning given to all who have an immediate interest, final and conclusive evidence in all courts, must afford additional security to titles, and avoid delay, doubt, litigation and expense.

“ We have seen that, by the law which prevails in our courts of law and equity, deeds and wills relating to real estates, and all other written instruments, are proved according to the ordinary rules of evidence only when there happens to be occasion for such proof. Even with regard to immediate interests, the policy of our law is not to require a man, out of possession, to assert his right under the penalty of losing it, but only to fix a period, after which he shall not be allowed, by asserting it, to molest the party whom he has so long left in possession; in the meantime it is thought enough to afford a party in possession the means of preserving his evidence. And still more, as to future interests, it is considered that persons cannot be justly or usefully expected to incur the trouble and expense of defending rights to the future enjoyment of property, when such rights may not entitle them to the possession of it until a remote period, or may depend upon the happening of uncertain events. For these reasons, the law of England, in cases where repeated actions are not allowed, does not make the decisions of the courts, with very few exceptions, binding on any persons, except those who are parties to the proceedings and those claiming under them; and

does not allow a party in possession to compel a party out of possession to contest his right, and does not require any person to establish his right to any interest until it comes into possession.

“ It must be observed, that whenever there is a present purpose requiring the whole property to be dealt with, a court of equity (giving to all persons having future interests an opportunity to be heard) does make a decree binding on them.”

Other arguments are, that the practice of probate in solemn form affords persons the opportunity of unduly compromising the rights of others—for instance, an executor under an adverse will is considered to represent all who claim under it, and may compromise their interests accordingly—and that this mode of proof is so seldom resorted to in practice, as to afford a strong presumption of its inutility.

Having thus disproved the necessity for probate even as regards personal estate, it is hardly necessary to say that the proposal to extend probate to real estate is summarily rejected. Indeed, this proposal involves a much more important and hazardous change in the law of real property than might be supposed, since the appointment in all cases of a real property executor or administrator would be necessary. A middle course has been proposed—to admit the office copy of a registered will (which is proposed to supply the place of the ordinary probate) as conclusive evidence in certain actions or suits brought by or against devisees of land; but this is also rejected, on the ground that it would be difficult to define such actions or suits, that all such actions and suits are not unfrequently resorted to as a means of trying the validity of wills, and that the heir at law, or a devisee under another will, could not justly be bound by a judgment or decree made on such evidence. The Report then goes on as follows:

“ But, assuming that there were any good reason for applying a different system of proof to wills from that which is applied to all other written instruments, even as respects wills of personal estate, we should still feel that there are great objections to continuing probate according to the practice of the spiritual courts.

“ The consideration of this question is intimately connected

with that of the last of the two other proposals above adverted to, namely, the suggestion that the jurisdiction of the Metropolitan Spiritual Court, proposed to be formed into the sole Court of Probate, should be so modified and improved as to render it effectively a concurrent tribunal with courts of equity for deciding questions of account and administration, and questions relating to legacies."

The Commissioners first meet this proposal by showing the inadequacy of the spiritual courts as at present constituted to deal with matters of account or with legacies, which indeed is sufficiently evidenced by the fact, that both these descriptions of business have been gradually transferred to the courts of equity, which alone possess the machinery required for disposing of them. Even when a creditor or legatee institutes a suit (as for an inventory) in a spiritual court, he often institutes a contemporaneous suit (as for an account) in a court of equity, thereby harassing the executor and diminishing the estate; and when the executor has accounted and been discharged in the spiritual court, he still remains liable to account in a court of equity.

"Thus it appears that what we have already stated to be in some degree admitted by the advocates for the jurisdiction of the spiritual courts, is practically felt; that, as now constituted, they are ill adapted for disposing of testamentary suits of whatever kind; and that even if a concurrent jurisdiction is to be conceded to them, (and it should be observed, that to leave in their hands the existing jurisdiction appertaining to probate as to personal estate, is to some extent to leave them a concurrent jurisdiction,) many existing objections must be removed.

"Concurrency of jurisdiction between any two tribunals cannot usefully exist unless they are governed by the same laws, adopt the same forms of procedure, have equally extensive powers, and are open in their decisions to the same restraint and correction. Accordingly one of the prominent arguments brought forward in favour of allowing to the spiritual courts a concurrent jurisdiction, is, that their forms of practice have a strong affinity to those in use in courts of equity. To some extent this may be admitted, but upon the whole it will be found that these courts at present differ from

our courts of equity in all the four points which we have mentioned as necessary to render useful the existence of concurrent jurisdictions."

The Commissioners then proceed to give detailed proofs of the difference between the spiritual and equity courts in the four particulars above alluded to. In the course of their observations they take occasion to comment upon a proposal contained in the Ecclesiastical Report, to enable the judge of the Ecclesiastical Court to try the validity of a will by *viva voce* evidence and a jury, or to direct an issue to be so tried before a judge of one of the common law courts. The comment in question is to the following effect:

"We are aware that this objection to the constitution of the courts has been met by the proposal to extend to the Court of Probate the power of proceeding upon *viva voce* evidence, and of directing questions of fact to be tried by a jury in cases proper for that mode of trial; but such a court could not, without great inconvenience, compel the attendance of witnesses from all parts of the country, and therefore, unless it were to go circuits, the greater part of the causes to be determined by it, indeed all except those relating to property near London, must be tried before the common law judges at the assizes."

This is no answer to that part of the proposal which relates to the directing of issues; in which respect, at least, a spiritual court might be placed upon the same footing as an equity court. The alleged discrepancy, however, in all the main points is clearly made out, and we think the arguments contained in the following paragraph unanswerable:

"If all the objections we have thus stated as affecting the jurisdiction of the spiritual courts were obviated, and the differences between their procedure and that of courts of equity were removed; if the ecclesiastical laws were reformed; trial by jury or *viva voce* evidence introduced; if the ecclesiastical jurisdiction were extended to real as well as personal estate, and to all testamentary subjects; and if the danger of conflicting decisions were removed or brought to the same level with that which exists as between two courts of equity, by subjecting them to the same appeal; the innovation thus produced would amount exactly and simply to the creation of a new



court of equity. The question, therefore, of adopting such an innovation, is the same with that of transferring the jurisdiction from the spiritual courts to the present courts of equity. The quantity of testamentary business at present transacted in the spiritual courts is not so great as to raise any doubt as to the sufficiency of the existing courts of equity to dispose of it. When two modes of innovation are proposed, the question to be tried between them must be, which offers a prospect of the best results. To us it appears that public utility will be better served by making use of the existing tribunals, than by constituting a new tribunal, or one which, though old in name, would in most of its principles and forms of practice be new; and we therefore think that the best course will be, to transfer the whole of the contentious jurisdiction now exercised by the spiritual courts in matters testamentary to the courts of equity."

As the result of the above reasonings, it is proposed that probate of wills should be discontinued, and simple registration adopted in its stead; that the whole testamentary jurisdiction of the spiritual courts, contentious and voluntary, should be abolished, and that jurisdiction, original and exclusive, over wills relating to personal property, should be vested in the courts of equity. The detailed mode of effectuating these changes may be read in the Propositions;<sup>1</sup> the anticipated advantages will be best given in the very words of the Report:

"The advantages which we expect from the adoption of the above proposals may be thus recapitulated:—

1. The rules of law and equity now applicable to the proof of all other written instruments would be extended, with proper modifications, to wills of personal estate, without interfering with any benefit resulting from the distinctions at present existing.

2. All wills would be collected in one place.

3. The inconvenient distinctions now existing between deeds and wills would be greatly diminished.

4. Suits for the administration of real and personal estates would be carried on in the same courts, and all questions affecting either the validity of the will itself, or the adminis-

<sup>1</sup> Post, p. 35.



tration of the property disposed of by it, might be decided in one and the same suit, and according to the same rules of law.

5. Simplicity, and consequently saving of trouble and expense, would be introduced."

Such a register of wills (they add) would in many respects, besides those abovementioned, be of great advantage to the public. "It would prevent the trouble, expense, and uncertainty of searches at various places. It would afford the means of obtaining, without difficulty, some of the most important evidence upon questions of pedigree, and diminish to a considerable extent the expense attending the transfer of real property. In such an establishment, all wills might be effectually preserved and secured, while at the same time the greatest facility might be afforded for inspecting the originals and obtaining copies."

It is suggested that the register of wills might be connected with the contemplated general register; that both, in short, should be departments of the same office, and be placed under the management of the same presiding officer.

"We think it advisable that all the wills, documents, and indexes, which are now deposited in the registries of the different courts of probate, should be transmitted to the General Register Office. The collection of these important documents in one place would afford the means of supplying defects in the present titles of estates, and materially diminish the difficulty and expense of proving such titles in future. These advantages would be considerably increased by the making of general indexes of such documents; and it is worthy of consideration whether it would not be advantageous to print such indexes."

It is proposed to render existing titles valid, notwithstanding any error has been committed in taking out administration,<sup>1</sup> and that, in suits for the performance of the trusts of a will or for the administration of assets, it shall not be necessary to make the heir or next of kin defendants, nor to establish the will; and that in such cases an official copy of the registered will shall be received as sufficient evidence of it. "Of course," it is said, "such decisions would not be binding upon the heir or next of kin; and, upon invalidating the

<sup>1</sup> See Prop. 47, 48, post.

will, they would be at liberty to recover the property in like manner, and to the same extent, as if the trusts decreed to be performed had been created by an invalid deed."

It is further thought unnecessary and burthensome, where the validity of a will is disputed in a court of equity and is to be tried by an issue, to require, as a general rule, the evidence of the witnesses to be taken upon depositions in the cause; and it is proposed to limit the practice.<sup>1</sup> Lastly, it is proposed to invest courts of equity with the power of setting aside wills on the ground of fraud; a power which, since Lord Macclesfield's decree in *Bransby v. Kerrick*<sup>2</sup> was overruled by the House of Lords, they have not been considered to possess.

The discontinuance of the jurisdiction of the spiritual courts as regards wills, almost necessarily involves its discontinuance as regards administration. It is therefore proposed to transfer the right of granting letters of administration to the Court of Chancery. All questions as to the right to administration will in this case be decided upon petition; when the right is clear, administration will be granted by masters or masters extraordinary in the same manner in which it is now granted by the officers of the spiritual court. The reasons alleged are substantially the same as those urged for transferring the rest of the testamentary jurisdiction. When executors refuse to act, or the next of kin renounce administration, a declaration in writing to that effect, signed by them, is to be registered in the Register Office for Wills; and an official copy of it will be sufficient evidence to enable a residuary legatee or a creditor to obtain letters of administration. Should the executor or next of kin refuse to sign such declaration, administration will be granted on its being made to appear that due notice has been given them. It is also proposed that the regulations recommended with respect to registering wills, and with respect to entering caveats against the registration of wills, shall be extended and made applicable to letters of administration.<sup>3</sup> Another change proposed is to discontinue the taking of security by bond or otherwise from administrators, which the statutes 21 Hen. VIII. c. 5, and 22 & 23 Car. II. c. 10, require the ordinary, or other person granting administration, to take. The first objection to the present

<sup>1</sup> See *post*, Prop.

<sup>2</sup> Bro. P. C. 437.

<sup>3</sup> See *post*, Prop.

practice is, that in most cases the taking of sureties has grown into a mere form; until very lately indeed, it is stated, the sureties were frequently the clerks of the solicitor applying for the letters of administration. A second and better objection is the following:

“ If the bonds were required in all cases to be entered into by responsible sureties, and were made effectual in other respects, they would create delay and inconvenience, which we think would be of more disadvantage to the public than the value of the security afforded by them. Persons proper to be administrators would in many cases find it difficult, and in some cases impossible, to procure persons of sufficient wealth to become their sureties for the amount of the property.

“ It is not usual to require any security from executors or other trustees. If any party interested in the property has any reason to believe that it is not safe in the hands of a trustee or executor or administrator, he may apply to the Court of Chancery to have it placed in the custody of the court, or collected by a receiver, and we think that this remedy affords as much protection as is consistent with the public convenience.

“ It therefore appearing to us that the security required at present from administrators is of little use, and that, if made effectual in all cases, it would occasion more inconvenience than advantage, we propose that so much of the statutes of 21 Hen. VIII. c. 5, and 22 & 23 Car. II. c. 10, as requires that security should be taken for the performance of the duties of administrators, be repealed.”

It is thought expedient to propose some alterations in the rules by which gifts in wills become void by the death of the person to whom they are made, or by reason of the devisee being the heir of the testator.

1. *As to Lapse.*—The following cases of hardship are mentioned as justifying a change:—

“ The rule, that gifts lapse if the person to whom they are made dies in the lifetime of the testator, sometimes operates with great hardship, and defeats in many cases the intention of the testator. When an estate is devised to a person in tail with remainder to another, it is manifestly the intention of the testator that the tenant in tail and his issue should take, and

that the person to whom the remainder is given should not take until all the issue of the intended tenant in tail have failed; and yet if such intended tenant in tail die in the testator's lifetime, leaving issue, and the testator is not aware of his death, or neglects to alter his will, the issue are wholly excluded in consequence of the gift to the parent having lapsed, and the remainder-man obtains the testator's estates. The hardship is very apparent in the usual case of a devise to the eldest, and every other son successively according to seniority in tail; if an elder son dies in the testator's lifetime, leaving issue, such issue are excluded, and the estate goes to the younger branch of the family. In another usual case, where a testator gives his property among his children, and a daughter or other child dies before him leaving a family, such family are disappointed. In all these cases, if the issue or family were to become entitled to the property given to their parent, the person to whom the remainder or residue is given would still be entitled to the property intended for him by the testator, and would have no reason to complain. It is true that the event of death might always be provided for, but it is found in practice that such provision is very rarely made. A testator does not contemplate that the immediate objects of his bounty, and especially his children, will die before him; he does not like to encumber his will with provisions which appear to be unnecessary, and he imagines that if the event should happen, he shall be able to alter his will. His legal advisers think the chance that such an event will happen and will not be provided for, is too slight an inducement for the trouble of inserting clauses to meet it, and in truth it would often be difficult to determine how far such provisions should be carried."

The proposal founded on these considerations may be seen in the Appendix. (Prop. 49.) It is limited to the cases of tenants in tail, and of the children and grandchildren of the testator. It is also proposed (Prop. 50), that where a devise of real property shall fail by lapse, or for any other cause, the property shall pass to the residuary legatee (instead of the heir, as now), unless a contrary intention shall appear.

Another rule marked out for abolition is the rule rendering in certain cases a devise to the heir at law void. After at-

## 32 *Fourth Report of the Real Property Commissioners*

tempting to trace the origin of this rule, the Commissioners state the following objections to it:—

“ The rule appears to us to be objectionable, because it creates several intricate distinctions, and has occasioned litigation among different classes of representatives. Where there is any difference between the estate which would pass by the devise, and the estate which the heir would take by descent, he takes by force of the devise, and in some cases, where the devise is contingent or executory, it is not settled in which of the two characters the heir will be entitled. In all cases the estate is considered to pass by the will, for the purpose of exonerating the heir from the liability he would otherwise be subject to, of being primarily liable for the whole of the specialty debts of the testator, although it would not be held to pass by the will, for the purpose of exonerating the heir from such debts as before the passing of the late statute<sup>1</sup> could not be recovered from the devisee. We also think, that where the testator expressly devises an estate, his intention may be inferred to be that the devise should take effect.

“ We consider, therefore, that the rule which makes the devise void in such cases, should be abolished, and that the heir should take by virtue of the devise.”

A good deal of doubt, as is well known, arises from the present state of the law relating to the assent of a personal representative, which may be given by parol, or implied from circumstances. The consequence is, that loose expressions and dubious acts have frequently been held to amount to an assent, and a great deal of uncertainty has ensued.

“ We think,” (say the Commissioners,) “ that these inconveniences should be remedied, and that it is desirable, as a general rule, that no interest in real property should be allowed to pass from a personal representative to a legatee without writing. We propose that the effect of assent by an executor or administrator should be taken away, and that the legal title should not pass without an assignment or release, except as to chattels, which pass by delivery. In case of a subsequent invalidation of the will, Courts of Equity should have jurisdiction to set aside the assignment or release, or to

<sup>1</sup> 1 W. IV. c. 47.

decree restoration of the chattel, saving the rights of purchasers for valuable consideration."

One more set of alterations and we have done. Much embarrassment has been found to result from interruptions in the chain of representation occasioned by the rule, that, when the sole or surviving executor dies without having obtained probate, his executor does not represent the original testator, but letters of administration *de bonis non* must be procured. A question has lately been made, whether this rule extends to the executor of an executor.<sup>1</sup> The 52d, 53d, and 54th Propositions are made for the removal of this source of embarrassment. It is said to have been under consideration whether the chain of representation might not be kept up by administrators as well as by executors, so that the administrator of an executor, and the executor or administrator of an administrator, might be the personal representative of the deceased owner; but the Commissioners "do not feel themselves justified in recommending such an alteration of the law, although they are aware that it would be productive in some cases of considerable convenience." Sometimes, it is said, executors unwittingly involve themselves in the administration of the effects of persons to whom their testator was executor, by omitting to renounce the executorship of such persons before proving the will. The Commissioners propose to give them the power of renouncing such executorship at any time before acting under it.

At present, letters of administration become absolutely void on its being made to appear that an executor, who subsequently renounces, had acted, or that there exists a will appointing an executor, though the will be not discovered until a considerable time after the death of the testator. The Commissioners propose that in all such cases, with one exception, the letters of administration should be merely voidable, and that all intermediate acts of the administrator shall stand good. The Report concludes as follows:

"At present every act done by an executor is valid, notwithstanding he died without having proved the will. If, either in his lifetime, or after his decease, the will be proved by another executor, or letters of administration be granted

<sup>1</sup> In the goods of Mary Powell, 3 Hagg. 195.

### **34** *Fourth Report of the Real-Property Commissioners*

with the will annexed, as soon as the will is brought into the registry of the proper Court of Probate, it has relation back to the death of the testator, and affords evidence of the title of the executor. Some uncertainty, in the absence of a general register for deeds, results from this rule, because it is impossible to ascertain whether any assignment or surrender of a term, or other assurance, may have been executed by an executor who has died without proving the will; and we believe no inconvenience would be occasioned by requiring an executor who has acted to make and register an affidavit, for no one can be compelled at present to accept an assurance from an executor until he has obtained probate. In order to diminish the insecurity of titles, we think it expedient to propose, that every assurance executed by an executor who has not made and registered an affidavit, while any person shall be living to whom letters of administration with the will annexed remaining unrevoked have been granted, shall be void.

“An executor who has proved the will, or acted in the execution of it, or an administrator, cannot get relieved from his office except by placing all the property in the care of a Court of Equity, and leaving it to be administered by the Court.

“On the contrary, trustees may at any time relinquish their trust after they have acted, upon duly accounting for the property; and if there be no power to appoint new trustees in the instrument by which the trusts are created, a Court of Equity will appoint trustees, to whom the property may be transferred.

“We propose, that a Court of Equity may at any time, in a proper suit, discharge from his office any executor who may have made and registered an affidavit, or otherwise acted as executor, or any administrator, and the Court of Chancery in any such case may grant letters of administration to any other person or persons.”

Having had little occasion to refer to the Appendix, we shall briefly specify its contents. The far greater part of it is occupied by a communication from Mr. Samuel Gale, comprising a complete History of the Ecclesiastical Courts, and an elaborate review of most of the subjects discussed in the Report. The writer is evidently a man of great information



and intelligence, and his communication (with the exception of Mr. Tyrrell's Suggestions) is perhaps the most valuable that ever was printed in such a shape. We recommend all who have occasion to write or speak about the Ecclesiastical Jurisdictions to refer to it. The other contributions are by Messrs. Wellbeloved, E. Tyrrell, R. H. Coote, T. Adlington, Freshfield and Son, Dunn and Wordsworth, Smith and Bayley, Frost, and Sir Harris Nicholas. Only two or three of these extend beyond a page. The longest and most important is that of Sir Harris Nicholas in support of the proposition to establish a General Registry and Index of Wills; a subject on which he is well entitled to be heard, as he and Mr. Protheroe were amongst the first to call attention to the evils resulting from the present multiplicity of Registries. Mr. E. Tyrrell's, as to the proof of Wills in London before the establishment of Ecclesiastical Courts, is also a valuable contribution.

*H.*

## PROPOSITIONS APPENDED TO THE REPORT.

---

1. That the Statute of frauds, so far as it relates to wills, (being ss. 5, 6, 12, 19, 20, 21, 22, and 23) shall be repealed.

2. That no will of any description, except such as are mentioned in the 4th Proposition, shall be valid, unless it be in writing, and signed at the foot by the testator, or some other person in his presence and by his direction; and the signature be made or acknowledged by the testator in the presence of two or more credible witnesses present at one time, who subscribe their names to the will.

3. That the statute 25 Geo. 2. c. 6, shall be deemed to apply to such witnesses.

4. That any soldier, being in actual service, or seaman at sea, may dispose of personal estate as he may do under the present law.

5. That a will executed according to Proposition 2 shall not require any other publication.

6. That any will made in exercise of a power shall be executed in the same manner as is required for the validity of other wills, and shall be valid notwithstanding the terms of the power may require the will to be executed with additional or other solemnities, which have not been observed.

---

7. That no will made by any person under the age of twenty-one years, and no will made by a *feme covert*, except by virtue of a



### 36 *Fourth Report of the Real Property Commissioners*

power, or, as to personal estate, with the consent of her husband, or for appointing an executor of a will of which she shall be executrix, shall be valid.

---

8. That all freehold estates, and all copyhold and customary estates, including an estate *pur autre vie* where there is no special occupant, and also every copyhold estate which would be devisable if the party entitled thereto had been duly admitted, and all leasehold estates and other personal property, and all estates, interests, and rights therein capable of being conveyed or transferred by the testator by any act *inter vivos*, (except estates tail and estates *in quasi* entail, and estates or shares of estates held by the testator in joint tenancy,) and also all rights of entry and of action or suit to any such estates, may be devised or bequeathed by will.

9. That any freehold or other property acquired by a testator subsequent to the execution of his will may pass by it, and a will shall be considered with reference to the property comprised in it as speaking at the testator's death, unless a contrary intention appears.

10. That no will shall be revoked otherwise than by another will or codicil, or by some writing executed and attested in the same manner as is required for the validity of a will, or by burning, cancelling, or tearing with the intention of revoking it by the testator, or in his presence and by his direction.

11. That obliterations made in a will shall have no effect unless duly attested as alterations in the same manner as is required for the execution of a will.

12. That no act done by a testator subsequently to the execution of his will with respect to any property comprised in it, shall operate as a revocation of any disposition thereby made of such property, except so far as a beneficial interest is conferred by such act on another person.

13. That the will of a woman shall be revoked by her marriage, and shall not be revived by the subsequent death of her husband.

14. That the will of a man shall not be revoked by his marriage and the birth of a child or children.

---

15. That the proof of wills and the grant of letters of administration in the Spiritual and other Courts now entitled to grant probate of wills and letters of administration, shall be discontinued, and that all the jurisdiction of such courts, with respect to legacies, accounts, inventories, and other matters relating to testaments and administrations, shall be abolished.

16. That a General Register Office for Wills shall be established in the metropolis, and that wills of every description shall be registered according to the subsequent Propositions, with other proper regulations.

17. That every will shall be registered by depositing at the Register Office the original will with two duplicate affidavits, by the executor or such of the executors as may be willing to act, stating the following particulars, viz. that to the best of the deponent's knowledge, information and belief, the paper proposed to be registered contains the last will of the deceased ; that (unless where the circumstances do not admit of such a statement) the testator was buried on a day and at a place to be therein specified ; and that the personal estate and effects to which the deceased was, at the time of his death, entitled beneficially, and without deducting any thing on account of the debts owing by the deceased, are under the value of a certain sum, to be therein specified ; which affidavit shall be taken before a standing commissioner, to be appointed as recommended in the 24th Proposition respecting Fines and Recoveries in the First Report of the Commissioners, or before a Justice of the Peace or Master Extraordinary in Chancery.

18. That one of such duplicate affidavits shall be kept with the will at the Register Office, and the other, with a copy of the will, shall be transmitted from the Register Office to the commissioners of Stamps.

19. That upon the registration of the will, an office copy thereof and of the affidavit, (which shall be distinguished as the original office copy,) shall be issued to the person or persons by whom the same shall be registered.

20. That when any executor who shall not have taken such affidavit as above mentioned at the time of the registration of the will, shall afterwards think proper to act in the executorship, he shall cause the original office copy, with some proper provision in case of loss, to be brought back to the Register Office, (for which purpose a summary remedy at law shall be given,) and shall deposit at the Register Office duplicates of an affidavit to be taken by him similar to those mentioned in proposition 17, and one of such affidavits shall be kept with the will, and the other be transmitted to the Commissioners of Stamps, in the same manner as is directed with respect to the duplicate affidavits to be in the first instance deposited with the will ; and the original office copy, together with office copies of all the affidavits of executors registering the same, shall be issued to some one or more of the executors.

21. That the stamp duties which are now payable on a probate

of a will shall be made payable on the original office copy of it, and the like penalty as is imposed on an executor who neglects to prove the will shall be imposed on an executor who neglects to register a will.

22. That before a will shall have been registered, any person interested in disputing it may deposit at the Register Office a caveat in writing under his hand to prevent the registration of the will, which caveat shall be in force for the space of two calendar months, unless before the end of that time, the same shall be withdrawn, or a will shall be established by the decree of a Court of Equity; and no office copy of any will of the testator named in such caveat shall be issued while such caveat shall remain in force.

---

23. That the original office copy of the will and of the affidavit shall, unless the will shall have been declared to be invalid by the decree of a Court of Equity, be received as conclusive evidence of the validity of the will at law and in equity with respect to personal estate and the title of the executor, except in suits in equity brought for establishing or setting aside the will.

24. That Courts of Equity shall have jurisdiction to determine the validity of wills with respect to personal estate in any suit, instituted either by an executor or administrator, or any legatee claiming under a will, to have it established or to have the trusts of it carried into effect under the decree of the court, or by any next of kin or other person claiming adversely to the will to have it declared void, and the registration of it prevented or recalled.

25. That in any such suit, when the validity of a will is disputed, an issue shall, if the court in its discretion shall think fit, but not otherwise, be directed to a Court of Law, in like manner as an issue may now be directed to try the validity of a will with respect to real estate, and the conduct of the prosecution and defence upon such trial at law shall be respectively given to such parties as the Court of Equity shall think proper.

26. That every decree of a Court of Equity which shall declare a will which has been registered, to be void, shall also order the executor to carry in the original office copy of the will to the Register Office to be cancelled, and shall direct some officer of the court to send a copy of the decree to the Register Office, which shall forthwith be entered on the register with its proper date, and noticed or referred to in the book where the entry of the registration of the will shall be made in the margin of the page in which such registration shall be entered.

27. That in any suit for setting aside a will, it shall be lawful for

the court to grant an injunction to prevent any executor or other person from acting under such will.

28. That every decree which shall declare one will or codicil to be void and establish another will or codicil, shall also direct the will or codicil so established to be received at the Register Office and duly registered.

29. That every decree which shall declare a will to be established shall also direct some officer of the court to send a copy or minute of such decree to the Register Office, which shall be entered upon the register and noticed or referred to in the margin of the entry of the will.

30. That in suits for carrying into execution the trusts of a will with respect to real or personal property, or for the administration of assets, it shall not be necessary to establish the will nor to make the heir or next of kin defendants; and in such suit the original office copy of the will shall be received as evidence of its validity, but the decision in such a suit shall not be binding on any heir or next of kin not being a party to the suit.

31. That in a suit for establishing a will as to personal estate, it shall not be necessary to have the trusts carried into execution under the decree of the court.

32. That in a suit for establishing a will with respect to real or personal estate, the evidence of the witnesses shall not be taken by depositions in the Court of Equity, unless some of the parties at or before the proper stage of the cause for the examination of witnesses shall give notice of an intention to have any witnesses examined, and in such case the costs of such proceeding shall be the subject of a special order of the court, independently of the general costs of the suit.

33. That Courts of Equity shall have jurisdiction to set aside a will, with respect to real or personal estate, on the ground of fraud.

---

34. That the jurisdiction of granting and recalling letters of administration now exercised by the Courts of Probate, shall be transferred to the Court of Chancery.

35. That the same parties as are now entitled to have letters of administration of any effects granted to them by any Court of Probate, shall be entitled to have letters of administration of the same effects granted to them by the Court of Chancery.

36. That the letters of administration granted by the Court of Chancery shall have the same force and effect in all respects as they would have by the present laws if granted by the Court or Courts of Probate having jurisdiction in respect of the effects;

## 40 *Fourth Report of the Real Property Commissioners*

37. That where there is no dispute respecting the right to letters of administration, the same may be granted by a Master or Master Extraordinary of the Court of Chancery, or by any such commissioner as mentioned in Proposition 17, in like manner as the same are now granted by surrogates and other officers of the Spiritual Courts.

38. That where the right to letters of administration is disputed, but no other relief by the appointment of a receiver or otherwise is prayed for, the same may be granted by an order of the Court of Chancery, to be made upon petition, and upon such evidence as the court may think sufficient.

39. That when any executor refuses to act, or any next of kin refuses administration, a declaration of such renunciation in writing, signed by such executor or next of kin, shall be registered in the Register Office for wills, and an office copy of such declaration shall be admitted as sufficient evidence of such renunciation, to enable a residuary legatee, or any next of kin, or a creditor, to obtain letters of administration.

40. That when no executor has made an affidavit which has been registered according to Proposition 17, and there is any executor who has not signed a declaration of renunciation which has been registered, or there are any next of kin who have not signed a declaration of renunciation which has been registered, the Court of Chancery may upon petition, if such executor or next of kin do not appear to oppose the same, and upon proof being given that due notice of the petition was served on such executor or next of kin, or of there being sufficient reason for such notice not having been served, or if such executor or next of kin shall appear, but not shew any sufficient cause to the contrary, grant letters of administration to the person who would be entitled thereto if such executor or next of kin had duly renounced.

41. That letters of administration shall be registered in the Register Office for Wills, by depositing the same with affidavits in duplicate, in the same manner as above proposed, with respect to the registration of wills.

42. That caveats against the registering of letters of administration may also be entered at the Register Office, in like manner as caveats against the registering of wills.

43. That Propositions 24, 26, 27, 28, 29, and 30 relative to suits for determining the validity of wills, and to decrees and other proceedings in such suits, shall (*mutatis mutandis*) be extended and applied to letters of administration.

44. That so much of the statutes 21 Hen. 8. c. 5. and 22 & 23

Car. 2. c. 10. as requires security to be taken for the performance of the duties of administrators, be repealed.

---

45. That all wills, documents, and indexes which are now deposited in the registries of the different Courts of Probate, be transmitted to the Register Office.

---

46. That every probate or administration heretofore granted, and not adverse to the title of any party in possession of any property of the testator or intestate, notwithstanding it may now be void or voidable, in consequence of having been granted out of a wrong court, shall be as valid as if it had been granted out of the proper court, or each of the proper courts, except where another probate or administration has been obtained out of the proper court, or each of the proper courts.

---

47. That when any person to whom any real property shall be given by will for an estate tail, or an estate *in quasi* entail, shall die in the life-time of the testator, leaving issue who would be inheritable under such entail, and such issue shall be living at the death of the testator; and also where any person being a child, or other issue of the testator, to whom any real or personal property shall be given by will for any estate or interest not determinable at or before his or her death, shall die in the life-time of the testator, leaving issue who shall be living at the death of the testator, such gift shall not lapse, but shall take effect as if the death of the testator had happened before the deaths of such tenant in tail, or child or grandchild.

48. That where the devise of any real property shall fail in consequence of the death of the devisee, in the life-time of the testator, or because it is contrary to any rule of law, or otherwise incapable of taking effect, and there shall be a residuary devise in such will, the property comprised in the devise which shall fail shall pass by the residuary devise, unless an intention to the contrary shall appear by the will.

49. That when any real property shall be devised to any person who at the time of the testator's death shall be his heir, or one of his co-heirs, such heir or co-heir shall be deemed to take as a devisee, and not by descent.

---

50. That the assent of an executor or administrator shall not pass the legal title to any legacy; and that such title shall pass from an executor or administrator to a legatee, without assignment or release, except as to chattels, which pass by delivery.

## **42    *Fourth Report of the Real Property Commissioners***

51. That Courts of Equity shall have jurisdiction to set aside any assignment or release of a chattel real, which may have been made by an executor or administrator, to or for the benefit of a legatee, or to decree the restoration or re-delivery to any person, of any moveable chattel which may have been delivered to a legatee; but without prejudice to the rights of purchasers for valuable consideration.

---

52. That the executor of the executor, or of the survivor of two or more executors, shall be the personal representative of the first testator, in preference to any administrator, notwithstanding the first executor or surviving executor shall have died without having registered the will according to Proposition 17.

53. That where an executor, who has registered the will according to Proposition 17, shall die, leaving any other executor or executors surviving, who shall not have then registered the will according to Proposition 17, such surviving executor shall be the personal representative of the testator, and be entitled to register the will according to Proposition 17.

54. That any executor, notwithstanding he has registered the will according to Proposition 17, may, at any time before he has intermeddled with the assets, or acted as the personal representative of any person of whom his immediate testator was executor, renounce and disclaim being the personal representative of such other person, by making a declaration in writing to that effect, and registering the same at the Register office for Wills.

55. That letters of administration, granted at a time when there shall be an executor who has not registered the will, according to Proposition 17, shall be voidable only and not void, notwithstanding there may be an executor living and not discharged, who may have acted or may afterwards register the will; but such letters of administration shall become void when a will has been registered by an executor, according to Proposition 17, or when such letters of administration shall be revoked by order of the Court of Chancery.

56. That all acts done by an administrator, under letters of administration which shall be voidable, shall be valid, notwithstanding such letters of administration shall afterwards become void or be revoked; but persons who shall have received any property as next of kin, shall be liable in equity to account for and to transfer the same to the legatees or persons entitled thereto under the will, without prejudice to the rights of purchasers for valuable consideration.

57. That every assurance executed by an executor who has not registered the will, according to Proposition 17, after the registra-



tion of letters of administration of the assets of the testator granted to any other living person which have not become void, nor been revoked; and also every assurance executed by an executor, who shall die without having registered the will, according to Proposition 17, shall be void.

58. That a Court of Equity may discharge an executor or administrator from his office, in like manner as a trustee may be discharged; and, upon any such discharge, may grant letters of administration to any other person or persons, which letters of administration shall be as valid as if the executor or administrator so discharged had died.

---

ART. II.—LIFE OF LORD COWPER.

---

THE ancient and wealthy family of Cowper, settled for several centuries in the county of Hertford, and having besides considerable possessions in Kent and Sussex, is traced back in lineal ascent to the middle of the fifteenth century. William Cowper, the representative of the family in the reign of Charles I., was created a baronet in 1641, and, adhering inflexibly to the royal cause, suffered an imprisonment of some length in Ely House, Holborn, together with his eldest son John, who died under his confinement. Sir William, however, long outlived his troubles, and is recorded by Stow to have resided many years at his castle of Hertford, in the practice of the most extensive hospitality and charity, until, dying at a great age in 1664, he was succeeded in his title and possessions by his grandson, a second Sir William, who represented his native town of Hertford in the two last parliaments of Charles II., and was among the most active partizans of the Exclusionists; being one of the party who, at the instigation and under the leading of Shaftesbury, presented to the grand jury of Middlesex, in June 1680, during the high fever of the Popish plot, articles for the indictment of the Duke of York as a papist recusant. By his wife Sarah, daughter of Sir William Holled, a London merchant, he had two sons, of whom the elder, William, forms the subject of the present memoir.



He was born, according to tradition, in his father's castle at Hertford, but at what period has never been precisely ascertained; most probably in the year 1665 or 1666. The place and circumstances of his education are equally unrecorded;<sup>1</sup> nor have we been able to collect any particulars of his early years, except that they were by no means free from irregularities, to which the universal license of that age ascribed merit rather than applied censure. While very young, it seems that he contracted a *liaison* with a Miss Elizabeth Culling, the proprietress of Hertingfordbury Park, a mile or two distant from Hertford town, which continued for several years; and by her he had two children, a son and a daughter.<sup>2</sup> It was even alleged against him that he deceived her by means of an informal marriage; an imputation which many years afterwards, in the virulence of party warfare, the bitter pen of Swift revived against him, taunting him (peer and chancellor as he had then become) with the undignified nickname of "Will Bigamy." He was entered of the Middle Temple, March 18, 1681, and on the 26th of May, 1688, (the required term of studentship being then seven years) was called to the bar; having previously, if we may judge from the period at which he became a tenant of chambers, (Nov. 1683,) devoted upwards of four years to the worship of Themis; divided however, we are afraid, with an adoration of more material objects of idolatry. Of the protracted hopes, of the capricious and chilling neglects, by which so many of no less eminence in his profession have in the outset been depressed and obscured, he had no experience. The influence of his high Whig connections, well seconded no doubt by his own promise of ability, and the legal acquirements of which he gave speedy proof, appear almost at once to have obtained for him employment and reputation in his profession, and (what was still more acceptable) to have introduced him to the favourable notice of the dispensers of preferment. As early as the year 1693,

<sup>1</sup> His name does not appear in the list either of Oxford or Cambridge graduates, and he was most probably at neither university.

<sup>2</sup> The daughter, by her brother's death without issue, became mistress of this property at Hertingfordbury, and afterwards sold it to Spencer Cowper, the Chancellor's younger brother, in whose family it remained till within the last twenty years.

when he could not have been much past five and twenty, and was scarcely yet of five years' standing at the bar, he had been appointed Solicitor General to the Queen, and enrolled in the list of King's Counsel—a distinction rated at that time of day at a far different estimate than now, when we see it bestowed with such unrespective profusion, and which then not only gave professional rank and promise of promotion, but implied the especial countenance of the crown; as may be inferred from the fact, that at no period during the reign of William III. or Anne, was it enjoyed by more than eight members of the bar in the whole. Even two years before this date we find him arguing at great length, and with much display of legal learning, a case in the King's Bench on an important and at that time novel question of law relating to the transfer of copyhold estate. In the parliament which met in November 1695, he was returned, jointly with his father, for the town of Hertford; and it is manifest that he was already master of one quality essential to success even more in parliament, if possible, than at the bar—namely, a very sufficient confidence in his own powers; for we are informed that on the very day he took his seat he found occasion three several times to address the house, and, speaking with much applause, already gave promise of the distinguished parliamentary reputation he subsequently attained. In the following year (1696) his name first occurs in the State Trials, as one of the crown counsel against Sir John Friend, Sir William Parkyns, and the other parties subsequently brought to trial for their participation in the Assassination and Invasion plot. Parkyns's case is remarkable as being the last that was tried under the old law, which forbade the appearance of counsel on behalf of prisoners accused of treason. The statute allowing a defence by counsel (7 W. & M. c. 3,) had already passed, and was to come into operation on the 25th of March. The trial was fixed for the 24th; Parkyns, on his arraignment, pressed earnestly for its postponement, so as to bring him within the benefit of the new law; a request which, reasonable as it would now be deemed, met with a peremptory refusal from the court. The evidence for the crown was summed up by Cowper, who certainly, according to the report in the State Trials, easily outdid his colleagues in oratory at least, if not in law. The case

next tried, that against Rookwood, Lowick and Cranborne, fell within the new act of parliament. Sir Bartholomew Shower accordingly appeared as counsel for the prisoners; and the numberless objections, both of form and substance, which he started, and the hours that were wasted in debating, refuting and re-urging them, with what would now be deemed an utter disregard of any thing like regularity of procedure, must have gone far to surfeit the judges with the alteration of the law. Of the guilt of all these parties, or of the propriety of the convictions in their several cases, the reports of the trials leave little or no room to doubt. But a very different and much more questionable character attaches to the proceedings which were instituted about the same time in parliament against Sir John Fenwick, for his accession to the same treason. The bill of attainder was avowedly resorted to for the purpose of supplying the place of a trial before the ordinary tribunals, in which, from the absence of the necessary proof by two witnesses, a legal conviction could not have been obtained—the bench being now somewhat differently filled than upon the trials of Russell and of Sidney. Cowper, who inherited all his father's attachment to whig principles, and whose personal prospects and interests, moreover, pointed the same road with his political predilections, was among the most active and influential supporters of the bill. An important point debated in the first instance, was whether the preamble of the bill, which stated only that Sir John had been *indicted* of high treason on the oaths of two witnesses (one of whom had since absconded), and had obtained from time to time a postponement of his trial under the pretext of making a full discovery of the conspiracy—contained any sufficient allegation upon which the house might proceed to hear evidence tending to prove him actually *guilty* of high treason. Upon this, as well as upon the more interesting question involved in the whole proceeding, how far the defect of legal evidence could or ought to be supplied by the extraordinary operation of a parliamentary attainder, we find Cowper ably but sophistically combating the objections urged against the bill; which however, as is well known, the government succeeded in finally carrying only by a very inconsiderable majority.

The part he took on this occasion could not fail to confirm

and secure him in the enjoyment of court favour; and he appears to have been employed in all the crown prosecutions of any importance, of which that reign was so prolific. Of these we may mention the trials of Lords Warwick and Mohun for the murder of Mr. Coote, in 1699; in the latter of which he was paid a rather unusual compliment at the expense of the Solicitor-General, Sir John Hawles. Mr. Solicitor had summed up the evidence on Lord Warwick's trial the day before in so mumbling and inaudible a tone of voice, as to occasion considerable trouble to the peers and interruption to the proceedings. When he rose to perform the same office on the present occasion, the same complaint was renewed; whereupon "several lords did move that one that had a better voice might sum it up, *and particularly* Mr. Cowper [he was the junior in the case]; but it being usually the part of the Solicitor-General, and he only having prepared himself, he was ordered to go on; but for the better hearing of him, several of the lords towards the upper end of the house removed from their seats down, as they did the day before, to sit upon the wool-packs." Their lordships might reasonably enough be willing to hear any of his brethren in place of the worthy Solicitor, who, whatever were his qualifications as a lawyer, belonged undoubtedly—independently of his lack of lungs—to the dullest and most prosaic school of matter-of-fact speech-makers.

In this same year it was that Cowper had to appear in a criminal court in a much less agreeable character than he was wont to fill there—as a witness, namely, on behalf of his brother (who was also a barrister in some repute) on a charge of murder. The circumstances of the case were altogether so curious, that a summary of them may interest such of our readers as have not become familiar with them by the report in the State Trials, or from the works of writers on medical jurisprudence. A young quaker lady of the name of Stout, residing with her mother at Hertford, had, it seems, conceived a violent passion for the young barrister, and resorted to all possible means of communicating and contriving meetings with him, married though he was; going so far as to repair clandestinely to his chambers in the Temple, on which occasion he virtuously avoided a meeting with her by pretending business out of town, leaving his brother to represent him, and,

we suppose, to lecture the lady upon her imprudence. Both brothers went the Home Circuit, and were in the habit, "out of good husbandry," of jointly occupying the same lodgings at their native town of Hertford. On the spring circuit of 1699, William being detained in town by parliamentary business, of which, as it seems, Miss Stout was by some means informed, Spencer Cowper received from her a pressing invitation to lodge during the continuance of the assizes at her mother's house. The same "good husbandry" which induced him to share his brother's lodgings, disposed him also, maugre the peril to which his virtue might again be subjected, to comply with an invitation which was to give him a lodging for nothing; but on arriving in Hertford, he found that his brother's letter which was to have communicated this change of purpose had not arrived, and that preparation had been made as usual to receive him at their lodgings. He went, however, to Mrs. Stout's to dinner, and there spent the greater part of the evening. About eleven at night, when he was preparing to go home, he was pressed by the young lady to remain and occupy a bed there. He appeared to accede, and accordingly the maid-servant (this was the account given by her on the trial) was sent up stairs to warm his bed, leaving her young mistress and him alone together. While thus engaged she heard the outer door of the house shut; and on her return down stairs after about a quarter of an hour, both of them were gone. The mother and the maid, after waiting some time in vain for the daughter's return, betook themselves to bed; the former, more solicitous, as it would seem, about her daughter's reputation than her virtue, and dreading the censures of the quaker community, refusing to allow any search to be instituted for her during the night. But early in the morning her dead body was found, *floating* as it was alleged, on a pond about a mile out of the town. A coroner's inquest came, without much inquiry, to the conclusion that she died by suicide; but the mother was not so satisfied, and preferred an indictment for her murder against Mr. Cowper and three other gentlemen, who also were attending the assizes on the day of her disappearance, and against whom the only ground of charge was some mysterious expressions which were sworn to have been interchanged between them on that evening relative to the

young lady, and which might be construed to import a knowledge of some design against her being in progress. A long and minute report of the proceedings is to be found in the thirteenth volume of the State Trials. Independently of the strange circumstances of the case itself, and the interest it excited from the station and character of the accused parties, it was moreover remarkable for several important questions of medical science involved in it, and upon which a great deal of evidence (conflicting of course) was given by eminent medical practitioners:<sup>1</sup>—viz. whether upon death by drowning, without violence or resistance, water would of necessity be received into the lungs or stomach; and whether the body of a person who had so committed suicide would, so soon at least after death, float upon the surface. On the part of the prisoners, besides the medical evidence adduced, several witnesses, among them William Cowper and his wife, deposed to the young lady's frequent fits of melancholy, and her repeated expressions of her wish to be rid of life, and prognostications of her approaching death; and it was proved also that Mr. Cowper had returned to his lodgings so shortly after eleven o'clock on the night in question, as to render it next to impossible that he could have been at or near the pond in which the body was found, after leaving the house of Mrs. Stout. All the accused were ultimately acquitted; but the mother was still unappeased, and procured an appeal of murder to be lodged against the verdict, which in the end was got rid of by an understanding between the Cowper family and the appellant, (the heir-at-law and a cousin apparently of the deceased,) who, by the connivance of the sheriff of Hertfordshire, got back the writ of appeal out of his office; a misfeasance for which the latter was visited with a considerable fine.

<sup>1</sup> Doctors Sloane, Garth and Wollaston, and William Cowper, the celebrated anatomist, were among those examined for the prisoners, (whose joint defence was conducted by Spencer Cowper in person.) One of the learned doctors (Dr. Crell) exhibited an amusing sample of the pedantry which is still heard so often from medical witnesses. "Now, my lord," says he, "I will give you the opinion of several ancient authors." "Pray, Sir," interrupts the judge, Mr. Baron Hatsell, dreading the coming dissertation, "tell us your own observations." "My lord," rejoins the doctor, "I humbly conceive that in such a difficult case as this we ought to have a great deference for the reports and opinions of learned men; neither do I see why I should not quote the fathers of my profession in this case, as well as you gentlemen of the long robe quote Coke upon Littleton in others."



The narrative of this transaction has led us somewhat astray from the proper subject of our notice, to whom we now return. On the occasion of Lord Somers's impeachment in 1701, his defence was warmly taken up in the House of Commons by Cowper, with more zeal however, as it proved, than discretion, since a long debate was thereby generated, in the course of which much of the impression made by Somers's manly and simple justification of his conduct earlier in the morning was worn off, and the impeachment, which would probably have been negatived had a division been taken upon the question at once, was carried by a very small majority. Its fate in the Lords is well known. Early in the following year, the accession of Queen Anne filled the Tories with joyful expectation, and threatened the entire extinction of Whig influence and favour. The cautious policy, however, of Godolphin and Marlborough hesitated to exercise against their opponents the extreme measures which the more intemperate of their party would have adopted, and many of the Whigs were retained in the offices they had enjoyed under the former reign. Among those who were thus spared was Cowper; being one of the only two king's counsel out of six to whom fresh patents were granted. He had now acquired a high reputation as a parliamentary speaker, and took a leading part in most of the important questions debated in the House of Commons. At the general election in 1700-1, he lost his seat for Hertford, where his father's interest had for some time been warmly contested, but found refuge in the little borough of Beeralston (now consigned to everlasting rest), for which he was returned in the two following parliaments in conjunction with Mr. King, afterwards his successor in the occupation of the woolsack. The Parliamentary History has however preserved no record of his speeches until we arrive at the debates on the celebrated case of Ashby and White, in 1704.<sup>1</sup> On that memorable occasion he distinguished himself by an able and unqualified opposition to the unconstitutional jurisdiction claimed by the House of Commons, and maintained with equal talent and spirit the legal right of an elector to claim damages at the hands of the returning officer for corruptly or improperly refusing to receive

<sup>1</sup> See Law Magazine, Vol. VI. p. 18, et seq. for a summary of the proceedings of both houses in this case.

his vote. He addressed himself particularly to the refutation of the arguments of Harley, then the Speaker and Secretary of State, the sum of which was, that the determination of all matters relating to elections, where no statute had expressly directed otherwise, belonged by law and precedent exclusively to the House of Commons. Admitting that the law and custom of parliament vested in the house the sole right to adjudicate upon election questions for the purpose of determining who were rightly elected, and that incident to that end it had the power also of inquiring into the rights of the electors, he yet maintained that the injured subject, deprived unlawfully of the exercise of his unquestionable right, was entitled to resort to the ordinary tribunals for redress of that wrong; a proceeding which, as it in no degree brought into question the propriety of the *return*, was entirely independent of, and trenched not upon, the lawful judicature of the House of Commons. The scandalous and barefaced corruption with which the jurisdiction of the house was exercised at the very period when they were so strenuously and intemperately contending for an almost unlimited extension of that jurisdiction, may be seen by a reference to Burnet, or any other historian of the time.

The difficulties and distractions of the Tory ministry, the lukewarmness of Godolphin's party spirit, and the influence and importunities of the Duchess of Marlborough, always a rancorous enemy of the Tories, opened the way to a fuller participation in the good things of office by the Whigs. It was only by concert with the latter party that the union with Scotland, a measure which the circumstances of the succession had rendered indispensable, could be expected to be carried. They exulted in the critical predicament into which the cabinet was brought, and Lord Wharton coarsely expressed the triumph of his party by declaring that "they held the head of the Lord Treasurer in a bag." One of the changes most pressingly urged upon the queen by her arrogant favourite, and struggled for during nearly two years with a pertinacity which no repulse could daunt, was the removal of Sir Nathan Wright from his office of Lord Keeper, and the elevation of Cowper, who had now become one of the most powerful supports of the Whig party, in his room. Wright was a violent Tory and high



churchman, odious for his covetousness, and suspected of corruption in the administration of his office and the disposal of church patronage. The queen nevertheless long and stoutly resisted the change, but was compelled at length to yield, which she did with undisguised ill-will; and on the 11th of October 1705, Sir Nathan being required to deliver up the great seal, it was transferred to the hands of Cowper with the title of Lord Keeper, and he was sworn of the Privy Council. His elevation was probably in truth not much more palatable to the prime minister than to his mistress, although he was compelled to promote it with a degree of apparent zeal which could have been prompted only by the multiplied difficulties of his situation. The day after the appointment was completed, in reply to Lord Dartmouth, who was telling him of the high expectation the public entertained of the new Lord Keeper, Godolphin coldly answered, "that he had the advantage to succeed a man that nobody esteemed; but the world would soon have other sentiments, for his chief perfection lay in being a good party man." It was a measure, however, which had a great effect in procuring for the government the support of the Whigs as a party; and the manner in which the Lord Keeper exercised his office speedily recommended him to all parties. One of his first measures of reform—"a thing of a great example," Burnet calls it—was to put a stop to the custom which had prevailed with his predecessors, of receiving from the officers and bar of the Court of Chancery large presents in money under the title of new-year's gifts; and which had come to be so considerable as to amount of late years to more than £1500; a practice which, if it was not bribery, "he thought came too near it, and looked too much like it. This," says the same historian, "contributed not a little to the raising his character; he managed the Court of Chancery with impartial justice and great despatch; and was very useful to the House of Lords in the promoting of business." These merits, of impartiality and despatch in the exercise of his judicial duties, are accorded to him by all contemporary writers. The Duke of Wharton, writing after his death, bears testimony to them in the following glowing terms of panegyric:—"The Lord Cowper came not to the seals without a great deal of prejudice from

the Tory party in general, among whom, I believe, there was not one but maligned him. But how long did this scene continue? He had scarcely presided in that high station one year before the scales became even with the universal applause and approbation of both parties. All signs of prejudice were removed, and Tories and Whigs joined in admiration of his most excellent qualities. There was not the least mark of party rage, rashness, rigour, or impatience, to be seen or traced throughout all his conduct in this critical branch of his high office; for which he showed such a masterly genius and uncommon abilities, that made easy to him the great task of dispensing justice; which, like the sun, he diffused with equal lustre on all, without regard to quality or distinction."—"The skilful pleader," says Steele in his dedication to him of the third volume of the *Tatler*, "is now for ever changed into the just judge; which latter character your lordship exerts with so prevailing an impartiality, that you win the approbation even of those who dissent from you, and you always obtain favour, because you are never moved by it." These testimonies, it is true, come from his political friends; but they are not opposed by any contemporary censure, as to these points of his character at least, from his adversaries, whether political or personal. Even Swift, when writing for posterity, and divesting himself, we may presume, of some portion of his party prejudices, although he depreciates him as a scholar and a statesman, ventures no imputation upon his conduct as a judge. "The Lord Cowper (he writes in his *History of the Four Last Years of the Queen*) was considerable in the station of a practising lawyer; but as he was raised to be a chancellor and a peer without passing through any of those intermediate steps, which in late times had been the constant practice, and little skilled in the nature of government or the true interest of princes, farther than the municipal or common law of England, his abilities as to foreign affairs did not equally appear in the council.<sup>1</sup> . . . . As to his other accomplishments, he was what we usually call *a piece of a scholar*, and a good logical reasoner; if this were not too often allayed by a fallacious way

<sup>1</sup> A circumstance noted in Lord Cowper's Diary may induce a belief that Swift has done some injustice to his capacity for the administration of foreign affairs. He alone of all the cabinet, it seems, had sagacity enough to distrust the concurrence

of managing an argument, which made him apt to deceive the unwary, and sometimes to deceive himself."

The personal exertions of the judge, however, (even if this belauded despatch were in itself—as we in these days may have good cause to doubt—a certain good, at all events unless it be the produce of an understanding profoundly stored with the knowledge of the principles, and habitually versed in the practice, of equitable jurisprudence,) could do little towards eradicating a mass of grievances which had been extending in depth and rancour for above a century. The complaints against the delay, vexatiousness, and expense of legal proceedings, especially in chancery, which had been increasing ever since the time of Bacon, had now become so loud and general as to force themselves upon the serious attention of the government and the legislature. In the session of 1705-6, Lord Somers, with the full concurrence of Cowper and the judges, introduced into the House of Peers the "Act for the Amendment of the Law and the better Advancement of Justice," which still stands upon the Statute-book (4 Anne, c. 16.) Burnet informs us that a much more extensive and effectual reform was provided for by the bill as it came down from the Lords; but as it went through the other house, "it was visible that the interest of under-officers, clerks and attornies, whose gains were to be lessened by this bill, was more considered than the interest of the nation itself; several clauses, however beneficial to the public, which touched on their profit, were left out by the Commons." The act, however, as it finally passed, wrought a substantial amendment of the delay and cost of law proceedings. In the next year a second bill, comprehending most if not all of the rejected clauses of the former,

of Lewis XIV. in the famous Barrier Treaty of 1710, and for expressing his doubts incurred the sharp rebuke of Godolphin. "Lord Treasurer, Lord President Somers, and all others lords, did ever seem confident of a peace. My own distrust was so remarkable, that I was once perfectly chid by the Lord Treasurer, *never so much in any other case*, for saying such orders would be proper if the French king signed the preliminary treaty. He resented my making a question of it, and said there could be no doubt of his signing. For my part, nothing but seeing so great men believe it, could ever incline me to think France reduced so low as to accept such conditions." The Lord Keeper, it would appear, had pretty often the misfortune to express opposite opinions to my Lord Treasurer's; being, perhaps, disposed to bolder measures than Godolphin's timorous and temporising spirit durst adventure on.

(as we learn from a contemporary pamphlet on the subject, for we find no trace of it in the Parliamentary History,<sup>1</sup>) was presented to parliament, but with no better success. We may reasonably believe that none of these reforms were proposed without the sanction of the Lord Keeper. He shares also with Somers the praise of having discouraged, as much as his predecessor had promoted, the jobbing in private bills, from which the speakers and clerks of both houses had been in the habit of deriving inordinate profits. Immediately on his acceptance of the seals, he had issued a strict injunction to all the officers of his court to discharge their duties without receiving any extra fees whatever; an order which, under the venerable practice which time and right honourable example had sanctified in their eyes, must have rendered him as little popular with the race of registrars and six clerks as the noble *soi-disant* reformer who is now threatening to lay so unmerciful a clutch upon the profits of their offices.<sup>2</sup>

The new Lord Keeper appears very speedily to have disarmed the Queen's dislike, if not conciliated her favour. The speech she delivered from the throne on the opening of the new parliament, within a fortnight after his appointment, is said to have been of his composition. It is considerably longer and in a less formal style than such addresses were then or now are wont to be; but we cannot say that it exhibits much more of the graces of eloquence. The ascendancy of Whiggism in the cabinet was manifested by the terms in which the Tory cry of "the church in danger" was denounced as the con-

<sup>1</sup> "Reasons humbly offered to both Houses of Parliament to pass a Bill for preventing delay and expense in Suits at Law and Equity:" printed in 1707. The alterations proposed comprehended several amendments in pleading, practice, and process, which have since been carried into effect, and some which yet remain to be —e. g. the abolition of the payment of *copy money* in chancery, and of the heavy fees of the registrars on the engrossment of bills in equity, &c. &c. No blame whatever is imputed to the then judges.

<sup>2</sup> On the trial of Lord Macclesfield, in 1725, when that notorious peculator justified his extortions by the usage of his predecessors, it was proved that in one instance, in 1716, a sum of 500*l.* had been paid for the use of the great seal by a party receiving the appointment of Master in Chancery; but it appeared also that the money was paid out of his own funds, not from the suitors' monies, as in Lord Macclesfield's cases; and moreover that Lord Cowper had in several instances expressly refused the receipt of presents on the appointment of persons to other offices.

trivance of malicious and disaffected hostility to the state. The accession of the Whigs to power appeared to have contributed much to the stability of the administration; the elections were carried in favour of their party by a great majority, and the temper of the new House of Commons seemed accommodating and liberal. In the following spring, the treaty of union with Scotland was formally opened, and Cowper was named one of the Commissioners for England, and took the leading part in the management of the negotiations. During their progress (November 9, 1706,) he was advanced to the dignity of the peerage, by the title of Baron Cowper, of Wingham in the county of Kent; and in the following May, the queen further manifested her favourable disposition towards him by investing him in council with the title of Lord Chancellor. He had already, by his father's death about a year before, succeeded to the baronetcy.

The trimming policy with which the Lord Treasurer Godolphin continued to temporize between the two great parties that divided the state, and to endeavour at the same time to gratify, as far as he durst, the known inclination of the queen to Toryism, had led to the introduction, some time previously to the period of which we are now speaking, of Harley and St. John into the ministry. Cowper, who knew the craft and insincerity of Harley's character, had foreseen that this ill-considered partnership would be the parent in the end of intrigue, dissension, and probable overthrow. He describes in an amusing strain, in a diary he kept at this period, the incidents of a dinner given by Harley on the occasion, at which all the Whig leaders were present. "On the departure of Lord Godolphin, Harley took a glass, and drank to love and friendship, and everlasting union; and wished he had more Tokay to drink it in. We had drank two bottles, good, *but thick*. I replied, his white Lisbon was best to drink it in, *being very clear*. I suppose he apprehended it (as most of the company did) to relate to that humour of his, which was never to deal clearly or openly, but always with reserve, if not dissimulation, or rather simulation; and to love tricks when not necessary, but from an inward satisfaction in applauding his own cunning." From this ill-omened junction sprung up the seeds of distrust and decline. The Duchess of Marlborough's influence, too,

had faded before that of Mrs. Masham, a less imperious and more artful favourite, whose personal interests and party connexions concurred in prompting her to flatter, instead of thwarting, the secret predilections of her mistress, and who omitted no opportunity of multiplying and exaggerating causes of dislike and division betwixt her and her ministers. Godolphin, thus threatened on the one side by back-stair influence and covert hostility, was harassed on the other by the unseasonable ambition, or rather avarice, of Marlborough, who was only prevented from obtaining the unprincipled demand he preferred of being invested with a commission as captain general for life, by the determination and independence of Cowper, whose advice the queen sought in the matter, and who not only endeavoured by the strongest representations to turn the duke from his extravagant and dangerous purpose, but when they were unavailing, put an end to the scheme by unreservedly declaring that if such a commission were drawn, he never would affix the great seal to it. That this resolution was dictated by an honourable spirit of resistance to an unconstitutional and insolent design, and was not prompted by any feeling of personal hostility to Marlborough, can scarcely be doubted from the fact, that when, on Sunderland's dismissal from his office in 1709, the duke threatened to throw up his command of the army, Cowper was one who, in conjunction with the Dukes of Newcastle and Devonshire, wrote to dissuade him in the most earnest terms from doing so. It was about this time also, if we may credit the statements and authorities of Macpherson, that Marlborough, in concert with Prince Eugene of Savoy, then in England, allowed himself to be drawn into the discussion at least of schemes of the most violent and unqualified treason, for the consolidation of his own and his party's power; one of them comprehending a plan for the occupation of the metropolis and the seizure of the queen's person by an armed force under Marlborough's command, and the compelling her to dissolve the parliament, and to punish the parties (that is, Harley and his friends) suspected of the secret correspondence with France which had just then been discovered. This scheme is said to have been communicated to the Lords Cowper, Somers, and Halifax; by whom however, even according to the suspicious authorities quoted by Macpherson, it was at once and absolutely



rejected; and they expressed their determination to proceed in the investigation according to the legal and ordinary course. The consequence, however, of the disclosures relative to the French correspondence was the removal of Harley and St. John from the ministry. But this contributed little towards restoring its consistence or vitality: they were indulged with equal opportunities as before of practising upon the resentments and predilections of the queen; and the dislike with which she viewed the party by whom they had been dispossessed was still deeper, and more openly exhibited. The chancellor was probably the only one of the cabinet whom she continued to regard with any thing like favour. It would seem from what shortly followed as if she, as well as the Tory leaders, considered the sincerity of his attachment to his party more questionable than it proved; and the earnest and repeated attempts which, as we shall see presently, were made to induce him to desert it, prove the high opinion they had at least of his ability and value as a political ally. In the following year (1709) the proceedings on the absurd impeachment of Sacheverell, and the universal ferment, and hue and cry of "Church in danger," which were successfully excited throughout the kingdom, came most opportunely to the aid of the Tories in completing the discomfiture of their adversaries. The Lord Chancellor of course presided on the trial, which began in Westminster Hall 27th February 1710, and was protracted for three weeks; during which the fanatical and turbulent churchman was attended to and fro by the tumultuous idolatry of a bigoted multitude, stuffed with a zealously propagated belief of a whig conspiracy to overturn the church, and sufficiently disposed before to disaffection and violence by the discontent arising from a general scarcity of provisions. Harley's plans were now fully enough matured to enable him to assume the offensive, and the entire disruption of the ministry was soon effected. The first blow was struck by the dismissal of Sunderland from his office of secretary of state; two months afterwards, Godolphin was as unceremoniously removed from the Treasury; and in September "the queen came to council (says Burnet) and called for a proclamation dissolving the parliament, which Harcourt (now made attorney-general in the room of Montague) *had prepared*: when it was read, the Lord Chancellor offered to speak, but the queen

would admit of no debate, and ordered the writs for a new parliament to be prepared." Almost all the remaining members of the cabinet were displaced or resigned their offices the same day. Harley, who had not originally contemplated so entire a sweep as this, but only the removal of Godolphin and his immediate dependents, had already in the most humble and supplicating terms solicited Cowper to retain his office, communicating to him, as a precedent for the treachery, Marlborough's secret correspondence with the jacobite Shrewsbury; but his overtures had been contemptuously rejected. The Chancellor, instantly on the breaking up of the council, obtained an audience of the queen, for the purpose of delivering up the seals. She expressed surprise at his determination,<sup>1</sup> and combated it with the greatest earnestness; and thrice returned the seals into his hands after he had laid them down; and when he persisted in refusing them, absolutely commanded him to take them, adding, "I beg it as a favour, if I may use that expression." Cowper could not refuse (such is his own account of the interview in his diary) to obey this command, but after a short pause said he would not carry them out of the palace except on the promise that the surrender of them would be accepted on the morrow. "The arguments on my side," he says, "and the professions and repeated importunities of her majesty, drew this audience into the length of three quarters of an hour." The next day, Harley and Mrs. Masham having been consulted in the mean time, his resignation was accepted without any further difficulty, and the great seal was transferred, after a short interval, to Sir Simon Harcourt.

The resolute and honourable consistency which Lord Cowper maintained on this occasion gave him new weight and credit

<sup>1</sup> Speaker Onslow, in one of his notes to Burnet's History, asserts, on the authority of Sir Joseph Jekyll, that Harley had made overtures to Somers, Halifax, and Cowper in conjunction, who were disposed to entertain them, had it not been for the indignant refusal of Lord Wharton to serve with Harley, whom he abused in the most contemptuous terms: and ascribes the expectation entertained by the Tories and the queen that Cowper would come into their views, to the circumstance of his retaining the seals so long after Godolphin's dismissal, and consenting to the Tory Harcourt's appointment as attorney-general. Macpherson, who takes more than one occasion of depreciating Cowper, and calls him elsewhere "a man of heavy and confused parts," says "he derived this favour, (of being retained in office,) perhaps, on account of his insignificance:"—an hypothesis not very easily reconcilable with the pains that were taken to gain him.



with his party, of which he might now be considered perhaps the most active and efficient leader. Never, probably, was there a period at which the conflict of parties raged more fiercely, or was conducted with more combination and system, than that of which we are now treating; and the aid of the press was largely invoked to give point and intensity to the mutual attack. The "folio of four pages," circulating to the remotest corners of the realm, with almost the speed of light, the detail of senatorial schemes and squabbles, the tale of public rumour and private scandal, as yet was not; still less were the breakfast-tables of that generation overspread with the huge sheet of four feet square, that now issues almost daily from the recesses of Shoe Lane and Blackfriars:—but lighter and more pointed missiles were supplied by the press in aid of the party war. Short and pungent political papers,—the Examiner, the Medley, the Freeholder, the Englishman, &c. &c.—employed the daily pens of no mean masters of the game. On the Tory side, Swift, Atterbury, Arbuthnot, Prior, Defoe,<sup>1</sup>—in the Whig interest, Addison, Steele, Maynwaring, and others, exercised their powers of invective, sarcasm, persuasion, apology, or flattery, to maintain the predominance of their own party, or assault that of their adversaries. The chiefs of the several factions themselves descended occasionally into this arena; and Bolingbroke (then Secretary St. John) having indited a "Letter to the Examiner," of which paper Swift about that time assumed the conduct, in which he called upon him to pass in review, and hold up to public censure, the foreign and domestic policy of the expelled ministry, and the tyranny and insolence of the Duchess of Marlborough and her creatures—Lord Cowper replied by a counter epistle addressed (anonymously at the time) to Isaac Bickerstaff (Steele, who conducted the Tatler under that disguise) in which he entered into a somewhat laboured defence of the policy of the late government, and retorted upon his opponent the machinations and political sins of the Tories; and in turn invoked the pen of *his* correspondent to pourtray the triumphs of the war, and the glories wherewith the nation had been blessed under a Whig ministry. "Describe," says he (we quote a portion of the letter, because it presents almost the

<sup>1</sup> Defoe began as a Whig, but found it convenient to change his principles soon after Harley's accession to power.

only specimen extant of the written style of its author, and that from a composition wrought evidently with some pains)—

“Describe the vast extent of the kingdoms and provinces undertaken to be wrested out of the enemy’s hands: pass leisurely from the battle of Blenheim to that of Saragossa, and all the way observe, that Heaven, to prevent our undervaluing the glorious cause which the allies contend for, has suffered no acquisition to be made but by true military conduct and fortitude, and permitted disgrace to fall on those only of their commanders who have acted rashly or carelessly, and without counsel or discretion. Place in the clearest light those generals, who, faithful to their sovereign, just to themselves, pursuing honour with an honest affection, not irregular lust, have by the sword in open day recovered almost all the Spanish dominions in Europe;—

Non cauponantes bellum, sed belligerantes.

Describe them negotiating with caution and probity in the cabinet equal to their generosity and vigilance in the field; and give them the same superiority in one as in the other over the vain pretenders to mastery in both. Then set to view in all magnificence, the head and soul of the alliance, the pious royal Anne; and next her those ministers and patriots who have given so many illustrious and immortal proofs of their duty and zeal for her person, and love to their native country. You cannot want shade sufficient for all this bright scene of beauteous images. The black hypocrisy and prevarication, the servile prostitution of all English principles, and the malevolent ambition of a perverse and arrogant faction, will serve to make the strongest contrast. And from the whole piece the world shall judge and own, in spite of senseless flattery, that the personal glory of monarchs is built upon the ability and integrity which their generals, ministers, and councils, shew in discharging their respective trusts, with just regard as well to the laws as to the prince.”

Both these compositions obtained considerable celebrity at the time; St. John’s, however, has much the advantage in ease, spirit, and poignancy. They are printed in the thirteenth volume of the Somers’ Tracts.

It was at this period that the unscrupulous pen of Swift, pouring out upon the party he had just deserted the double bitterness of a renegade’s hostility, assailed Lord Cowper with the old story of his connection with Miss Culling, to which we before alluded; choosing for his purpose to represent it as an actual marriage, and ingeniously combining with the

imputation upon his lordship's morality a no less malicious insinuation against his orthodoxy:—"This gentleman,"<sup>1</sup> says he, (in the 22d number of the Examiner, published some three months after the change of ministry,) "knowing that marriage fees were a considerable perquisite to the clergy, found out a way of improving them cent. per cent. for the benefit of the Church. His invention was, to marry a second wife while the first was alive, convincing her of the lawfulness by such arguments as he did not doubt would make others follow the same example. These he had drawn up in writing, with intention to publish for the general good; and it is hoped he may now have leisure to finish them."—Again, in the 26th number, after eulogising the ability and eloquence of the new Lord Keeper Harcourt, he contrasts him with his predecessor in the following cutting terms;—"It must be granted that he (Harcourt) is wholly ignorant in the speculative as well as practical part of polygamy; he knows not how to metamorphose a sober man into a lunatic;<sup>2</sup> he is no freethinker in religion, nor has courage to be patron of an atheistical work, while he is guardian of the queen's conscience."—The last paragraph refers, we presume, to the chancellor's having accepted the dedication of some of Toland or Tindal's heterodox publications; there is reason, indeed, to surmise that his opinions on religious subjects, or at least his practice, partook of the license so fashionable in the age and with the party in which he was brought up.

The Tories were not satisfied with the victory they had achieved in driving their adversaries from the helm, but sought to push their triumph into vengeance. They began by an inquiry into the conduct of the war in Spain, and after long examinations of Lord Peterborough and the other generals who had held commands in it, a vote of censure was proposed on

<sup>1</sup> "Will Bigamy," by which name he several times designates Cowper; as Godolphin is styled "Mr. Oldfox," and Wharton held up to execration under the name of Verres. In another place, Lord Cowper is also most probably pointed at under the character of Cinna. Voltaire mentions, in the *Encyclopédie*, a tract in defence of polygamy, which he states to have been attributed, most probably in malice or irony, to Lord Cowper's pen.

<sup>2</sup> This alludes to a commission of lunacy issued by the Chancellor in 1709 against Richard Viscount Wenman: his case excited much interest at the time, and was made, like almost every thing then, a party matter. See the *Tatler*, No. 40.

the late ministry for having embarked in offensive hostilities under circumstances and with means which rendered a defensive policy alone justifiable. Lord Cowper took a prominent part in the defence of his colleagues and himself, and his name is found to all the protests against the criminatory resolutions of the Lords. Harley, now become Earl of Oxford and Lord Treasurer, bent all his efforts towards the establishment of that peace which was afterwards so disgracefully consummated at Utrecht: a course to which he was urged at least as much by the difficulty of providing supplies for the maintenance of the war as by any more patriotic motive. On the next meeting of parliament (December, 1711), the first trial of strength arose upon the resolution moved by Lord Nottingham (Swift's "Dismal"), who had just joined the Whig opposition, to append to the address to the throne the advice of the two houses, that no peace could be secure as long as Spain and the West Indies were left in the possession of the House of Bourbon. The Whigs were still strong in the Lords; the Duke of Marlborough's manly and impressive vindication of his conduct and policy, zealously seconded by Cowper, Halifax, and other leaders of their party, had a powerful effect upon the house; and notwithstanding the presence of the queen, who, after divesting herself of her robes of state, had returned to hear the debates *incognito*, the resolution was carried by a majority of three. "The partisans of the old ministry (this is Swift's account) triumphed loudly and without reserve, as if the game were their own. The Earl of Wharton was observed in the house to smile and put his hands to his neck when any of the ministry were speaking, by which he would have it understood that some heads are in danger." This was, however, a premature triumph; the Tories maintained their ascendancy, and signalized it by the expulsion of Marlborough—whom they had not in the outset ventured absolutely to break with, although they had assailed him with every species of obloquy and insult—his fame blackened with charges of peculation and mismanagement, from all his employments.

The narrative of Lord Cowper's life during the remaining years of Queen Anne's reign, so far as we have the opportunity of tracing it, is little else than the history of the parliamentary disputes and struggles between the two parties, in all

the more important of which he was prominently engaged. He opposed with unremitting hostility the ministerial projects of peace, which terminated in the memorable and ignominious Treaty of Utrecht; and subsequently denounced it in the most energetic terms:—"I cannot remove my finger from the original of our misfortunes, 'the cessation of arms.' We were then told, that if a blow had been struck, it would have ruined the peace. Would to God it had ruined *this* peace!" The breach which had already begun between Oxford and Bolingbroke, and the determination with which the latter pushed his schemes for defeating the Hanover succession, and for the establishment of high-church and jacobite ascendancy, produced the introduction, in the session of 1714, of the noted Schism Bill, the effect of which, had it come into active operation, would have been to subject all classes of dissenters to the most inquisitorial and exasperating persecution. Of this odious measure Lord Cowper was among the foremost adversaries; and signed the spirited protest against its passing, which remains on the Lords' journals. On the very day on which its operation was to have begun, the designs of its authors became at once abortive, and the whole fabric of their power was rent asunder, by the queen's unexpected death.

The posture of affairs was now altogether changed: the Whigs were again in the full blaze of triumph; and Cowper, who had been long in correspondence with the Elector, and immediately on the passing of the Act of Security in 1706 had written to assure him of his zeal for his person and devotion to his service, was nominated one of the Lords Justices for the administration of the government until the coming of the new sovereign; nor had four-and-twenty hours elapsed after his arrival at St. James's, when the great seal was demanded from Lord Harcourt, with circumstances almost of personal indignity, and forthwith delivered to Cowper, who (21st September 1714,) was declared a second time Lord Chancellor; and almost immediately afterwards was honoured with the appointment of Lord Lieutenant of his native county. He retained the seals until, in the spring of 1718, after the breach between the parties of Walpole and Townshend on the one hand, and Stanhope and Sunderland on the other, and the elevation of the latter to the head of the government, finding the conduct of affairs taking a

course more and more alien from his principles, and his position in the cabinet daily more unsatisfactory to him, he finally resigned his high office, again to combat, for the short remainder of his life, in the ranks of opposition. The king accepted his resignation with reluctance, and testified his sense of his merits by advancing him (March 18, 1718), to the dignities of a Viscount and Earl, by the titles of Viscount Fordwich, of Fordwich in Kent, and Earl Cowper. The preamble to his patent was drawn up, in terms of the most glowing eulogy, by Hughes the poet, on whom he had conferred, unsolicited, an office of considerable emolument in the Court of Chancery, and who was the only one of his dependents whom he expressly recommended to the patronage of his successor, Lord Parker.<sup>1</sup>

We have already touched on the most prominent of Lord Cowper's judicial merits. His legal knowledge was undoubtedly extensive and various. The equity and common law departments of practice did not at that time fall so exclusively into the hands of distinct classes in the profession, as to render it, as at present, a matter of necessity that an individual of even high eminence in the latter must have much to learn when he came to administer the former. The principles of our equitable jurisprudence, moreover, were then comparatively in their infancy; not, as now, defined by a long series of judicial determinations, and circumscribed within a system of rules and a course of practice little less precise than those which regulate the administration of the other branches of our municipal law. An intimate familiarity with precedents and practice was then, therefore, of less immediate importance in the formation of an equity judge; but as cases of the first impression arose almost daily, it was perhaps even more necessary than now that a mind deeply conversant with *principles*, and capable at the same time of applying them with a discriminating precision,

<sup>1</sup> Hughes appears to have been a great favourite with the Cowper family. Two copies of encomiastic verses to his memory are prefixed to his poems, which bear the signatures of Judith and William Cowper, the Chancellor's niece and nephew. Among his poems are two panegyric odes to Lord Cowper, in one of which, in imitation of Horace (Carm. ii. 20) he imagines himself transformed out of his unpoetical human shape by his patron's favour and friendship, and soaring as a swan. A few days before his death, he dedicated to him his well-known tragedy of the Siege of Damascus.



should preside in the Court of Chancery. In these respects it is impossible, undoubtedly, to claim for Lord Cowper a place in the same rank with a Hardwicke or a Nottingham; but the fact that scarcely any of his decrees were reversed on appeal (although some of them are recorded to have been unsatisfactory to "that great man, Mr. Vernon," who appears to have been the oracle of the chancery bar in those days) is a testimony to the soundness of his judicial determinations, the more unquestionable that from the comparatively short period for which held the seals on both occasions, an appeal from his judgment to the House of Lords was not necessarily, as in some later cases, in effect a rehearing of the cause before the same judge. His decisions are contained in the reports of Vernon and Peere Williams, and the *Precedents in Chancery*; the third volume also of the collection entitled *Reports in Chancery* comprises a few of the most important cases heard before him during his first chancellorship. Valuable as these reports are to the lawyer—more valuable perhaps than the bulky volumes of our day, wherein everything, good, bad, and indifferent, that is made matter of question or experiment in Westminster Hall (at least before the courts of common law) is noted down with the same prolix fidelity—it is in vain to look to them for any thing like a faithful representation of the language or style of elocution of the judge whose decisions they record. The last mentioned volume only pretends to give, in one or two instances, (particularly in the great case of *Orby v. Mohun*,) a verbatim report of the judgments; which appear however to be distinguished, in a literary point of view, more by a certain quaintness of diction than any thing else—which, if it be not in truth the property rather of the reporter than of the judge, would seem to have been imbibed from a recent and laborious perusal of the erudite pedantries of Lord Coke.

His personal demeanour on the bench was marked at once by dignity and courtesy. In illustration of the latter, we find related by several collectors of anecdotes a story of his considerate kindness towards Richard Cromwell, the former Protector, who, in the year 1705, was compelled to apply to the Court of Chancery against a daughter who disputed with him the title to a manor he inherited from his mother, and on whom the counsel opposed to him had been making some

unworthy personal reflections. It is doubtful, perhaps, whether the story does not in truth belong to a later period, and to a descendant of the Cromwells instead of the Protector Richard.<sup>1</sup> Miss Hawkins, however, in her Memoirs, tells it of Cowper in the following circumstantial manner, on the alleged authority (derived through Charles Yorke) of Lord Hardwicke, who is stated to have been in court at the time—that however could scarcely be the case in 1705, for he was not then fifteen. “The counsel made very free and unhandsome use of his (Cromwell’s) name, which offending the good feeling of the Chancellor, who knew Cromwell must be in court, and at that time a very old man, he looked round and said, ‘Is Mr. Cromwell in court?’ On his being pointed out to him in the crowd, he very benignly said, ‘Mr. Cromwell, I fear you are very inconveniently placed where you are; pray come and take a seat on the bench by me.’ Of course no more hard speeches were uttered against him. Bulstrode Whitelocke, then at the bar, said to Mr. Yorke, ‘This day so many years I saw my father carry the great seal before that man at Westminster Hall.’”

Lord Cowper presided in 1716 as Lord High Steward on the trials of Lord Derwentwater and the other peers implicated in the northern rebellion, and in the following year on the impeachment of the Earl of Oxford. His speech in passing sentence on the rebel lords who had pleaded guilty has been commended, we think, beyond its merits. The phrases are well chosen, the sentences well rounded; but the whole composition is cold, rhetorical, and unimpassioned. It may be doubted, indeed, whether either his powers of mind or temperament qualified him for the forcible expression of the deeper and more passionate emotions, whether of anger or pity. It was in *persuasion*—clothed in all the garniture of a symmetrical and graceful eloquence—that his triumphs as an orator were achieved; the regions of pathos and invective lay equally beyond him.

The secret of Lord Oxford’s easy escape from the perils of his impeachment is now pretty well understood to have lain, not in the disputes between the two houses on points of form which were apparently the proximate cause of his acquittal, but in the fears of Marlborough, of whose secret correspondence

<sup>1</sup> See Law Mag. vol. iii. p. 99, note.



with the court of St. Germain's he threatened to produce the proofs upon his trial. The Chancellor's demeanour towards his old opponent was liberal and courteous. Within a year or two afterwards—such are the changes and chances of political alliances—we find them sitting upon the same opposition bench, voting together in the same minorities, and joined in the same protests.

The only measures of importance upon which Lord Cowper is recorded in the parliamentary reports as a speaker during his last occupation of office, are the Septennial Bill in 1716, and the Mutiny Bill a few weeks before his resignation. He is stated to have addressed the House at considerable length on both, but the merest fragments are preserved of his speeches. After his retirement from office he appears much more frequently and prominently in debate. It is impossible within our limits even to refer to all the occasions on which he is mentioned as having spoken at length. He supported the "Bill for strengthening the Protestant interest," so far as it went to the repeal of the Schism Act, which he had so strenuously opposed in the last reign, but had not so far emancipated his understanding from the trammels of orthodox alarms, as to assent to the repeal of the sacramental test—a consummation, indeed, to which it took another century to reconcile the fears and consciences of the legislature.

In the year 1720, the splendid bubble of the South Sea scheme threw all ranks of the community into a delirium of greedy expectation. Lord Cowper was among the few who escaped the infection, and distinguished himself by an uncompromising opposition to the project, which he described as "like the Trojan horse, ushered in and received with great pomp and acclamations of joy, but contrived for treachery and destruction;" and truly predicted that a contract which put such enormous profits into the pockets of a few interested individuals, could not prove otherwise than prejudicial to the community. In a few months the bubble burst, and almost universal ruin and bankruptcy ensued. In the course of the inquiry which followed into the conduct of the company, an incident occurred which showed the respect and influence Lord Cowper's character and talents commanded in the House of Peers. It was apprehended that Knight, the treasurer, who had been the

negotiator of most of the fraudulent and corrupt practices by which the passing of the South Sea Act had been secured, was on the point of absconding out of the kingdom, and it was proposed to Lord Sunderland to prevent his escape by an immediate apprehension, without waiting for any parliamentary resolution against him. Sunderland, who had the best reasons in the world for not desiring to push matters to extremities against inferior delinquents, affected to acquiesce, but said, before any motion was made for the purpose, the Earl Cowper should be consulted, "for without his joining in with it there was no likelihood of its passing, and then Knight would be alarmed to no purpose. The other lord (who had made the proposal to Sunderland) applied to Earl Cowper, who seemed very averse to the taking any such step, till, upon Knight's further examination, the House should come to a resolution particularly with regard to him. Upon which the matter dropped; and it was suspected that the Earl of Sunderland, knowing the Earl Cowper's sentiments, referred that other peer to him on purpose to prevent the motion's being then made." Knight speedily received a hint of his danger, and the same night was on his way to France.

On the opening of the session of 1721-2, the immense navy debt, the commercial treaty with Spain which had just been concluded, and the measures necessary to guard against the introduction of the plague from France, where it had been raging to a dreadful extent during the summer, formed the principal topics of the royal speech. On all of them warm debates arose, in which Lord Cowper was a frequent speaker and protester—for a protest was then the certain *pendant* to a debate—and arraigned in severe terms the extravagance and mismanagement of the government. In reference to the last, he moved the introduction of a bill for repealing the provisions of a statute passed in the preceding session, which authorised the forcible removal of persons infected with the plague, or even of healthy persons out of an infected family, to a lazaretto, and the drawing lines of entrenchment round infected places. The protest which he drew up on the rejection of this bill is remarkable for the sensible and temperate views it expresses on the subject of contagion and quarantine, and

which have since been amply confirmed by experience and scientific inquiry.

Lord Cowper's conduct and principles did not entirely exempt him from the imputation levelled against so many eminent persons of that time, of being secretly favourable to the interests of the Pretender. On the discovery of the Jacobite conspiracy in 1722, Christopher Layer, the barrister, who was first brought to trial, and made strenuous efforts to save himself by successive disclosures, and by impeaching almost every body whom he considered most obnoxious to the ministry, declared in one of his examinations before the secret committee of the House of Commons, that he had been told by his confederate, Plunket, of the existence of a Jacobite club, called in Plunket's letters Burford's club, of which Lord Orrery was chairman, and which met monthly at the several members' houses in turn; and that among its members were Lord Cowper and several other lords and commoners whom he named—some of them of undoubted Jacobite principles; and (in another examination) that Lord Orrery had assured him (Layer) that Lord Cowper had told him 200 Tories and 90 Grumbletonians (a cant term by which the Whigs were designated among the Jacobite party) would try their last efforts in the House of Commons. One of Plunket's letters also, preserved in Macpherson's collection of original papers, insinuates that "Cowper, the late Chancellor, if he could get off handsomely from the Whigs, would join with the Princess Anne in all her measures." That this accusation, which rested altogether on the assertions of this Irish jesuit and spy, was as unfounded as it was malicious, it is impossible to doubt. Lord Cowper expressed the strongest indignation at the charge, and declared, "that after having, on so many occasions and in the most difficult times, given undoubted proofs of his hearty zeal and affection for the Protestant succession, and of his attachment to his majesty's person and government, he had just reason to be offended to see his name bandied about in a list of a chimerical club of disaffected persons, printed in a parliamentary report, on the bare hearsay of an infamous person, notoriously guilty of gross prevarication." He even dropped a hint that the lies of the confessions were enough to give an air of fiction to the whole conspiracy; and concluded by a motion for summoning Plunket to the bar

of the House for examination on the subject. Lord Townshend, the Secretary of State, while he expressed the fullest conviction of the utter falsehood of the imputation, vented also his surprise "that a noble peer, whose abilities and merit had justly so great weight in that illustrious assembly, should upon a trivial circumstance ridicule as a fiction a horrid and execrable conspiracy, supported by so many proofs as amounted to a demonstration." The government, however, refused to assent to Plunket's examination at the bar, and Lord Cowper thought it necessary to circulate a solemn declaration of his innocence, (which was published in the *Historical Register* for 1723,) affirming his entire ignorance of the existence of the supposed club, and even of the persons of many of its alleged members. He was not, however, deterred by the promulgation of these calumnies from opposing, in the most uncompromising manner, all the arbitrary proceedings of the government in the prosecution of the conspirators. He had already ineffectually resisted the suspension of the Habeas Corpus Act, at least for a longer period than six months, and now waged an unremitting, though equally fruitless, war against the Bills of Pains and Penalties, by which the government determined to punish Atterbury and his co-conspirators, on evidence of the most ultra-legal and inconclusive character. His speech on the third reading of the bill against Atterbury is by far the most perfect and interesting specimen which has been preserved to us of his parliamentary eloquence; at once masterly in argument, admirable in illustration, rich and copious in diction and ornament. Our limits allow space for only one or two passages. He happily ridiculed the absurd distinction between legal and moral evidence, and the position of the Solicitor General, Sir Clement Wearg, that no evidence was, strictly speaking, legal, but what was mathematical:—

"Legal evidence is nothing else but such real and certain proof as ought in natural justice and equity to be received; and therefore the oath of one credible witness, being certain and sufficient to induce a belief of the things he swears, is legal evidence; and yet so tender is our law, so great a degree of certainty does it require, that as it now stands, two positive witnesses are required to convict a man of high treason. . . . Will any one pretend to say that the oral evidence of witnesses can be called mathematical? But the gentleman

goes on, and says, that the evidence for this bill is legal in the ordinary sense of the word, [it consisted mainly of hearsay and comparison of handwriting]: on the contrary, I beg leave to affirm that it is not legal in any sense whatsoever. No act of parliament has made it legal, nor can it in natural justice or equity be called so, for want of sufficient certainty. . . . . The wisdom and goodness of our law appear in nothing more remarkably, than in the perspicuity, certainty and clearness of the evidence it requires to fix a crime upon any man, whereby his life, his liberty, or his property may be concerned. Herein we glory and pride ourselves, and are justly the envy of all our neighbour nations. Our law in such cases requires evidence so clear and convincing, that every bystander, the instant he hears it, shall be satisfied of the truth of it. It admits of no surmises, innuendoes, forced consequences, or harsh conclusions, nor any thing else to be offered as evidence but what is real and substantial, according to the rules of natural justice and equity. . . . . The distinctions that have been made, and the instances that have been produced, show only what *legal* evidence is sufficient for conviction and what not; and if that were the question now before your lordships, it would deserve another consideration. The question now is, whether any evidence at all has been offered to your lordships to fix treason upon the Bishop of Rochester? That there is no legal evidence it is agreed on all hands; and I hope I have sufficiently satisfied your lordships, that if it be not legal it is not real evidence, nor such as in natural justice and equity ought to be received, and therefore no evidence at all."

The peroration is striking:—

" My lords, I have now done; and if on this occasion I have tried your patience, or discovered a warmth unbecoming me, your lordships will impute it to the concern I am under, lest, if this bill should pass, it should become a dangerous precedent to after ages. My zeal as an Englishman for the good of my country obliges me to set my face against oppression in every shape; and wherever I think I meet with it—no matter whether one man or five hundred be the oppressors—I shall be sure to oppose it with all my might. For vain will be the boast of the excellency of our constitution; in vain shall we talk of our liberty and property secured to us by laws, if a precedent shall be established to strip us of both, where both law and evidence confessedly are wanting.

" My lords, upon the whole matter, I take this bill to be derogatory to the dignity of the parliament in general, to the dignity of this house in particular; I take the pains and penalties in it to be

either much greater or much less than the bishop deserves; I take every individual branch of the charge against him to be unsupported by any evidence whatsoever; I think there are no grounds for any private opinion of the bishop's guilt but what arises from private prejudice only; I think private prejudice has nothing to do with judicial proceedings; I am therefore for throwing out this bill."

With this honourable display of principle and public spirit his distinguished career was closed. His health had been long delicate, and had for years been partially sustained only by a strict adherence to regimen in exercise and diet. Immediately on the prorogation of parliament, within a fortnight after the passing of the Bill of Pains and Penalties, he retired, overwrought with the exertions of the session, to his house in Hertfordshire, in the hope of recruiting his shattered health by the enjoyment of quiet and fresh air. But his constitution was enfeebled beyond recovery; his strength daily declined, until, entirely worn out, on the 10th of October 1723, he breathed his last, and was buried on the 19th of the same month in the parish church of Hertingfordbury. That church, which contains splendid monuments to his brother and other less eminent members of his family, has not even a tablet to record the talents and virtues of the distinguished founder of their nobility.

He departed not however unhonoured or unsung. A few days after his death, the Duke of Wharton devoted the fortieth number of his *True Briton* to an elaborate panegyric, in the true style of a French funeral *éloge*, upon every part of his character and conduct, public and private; of which if but the half was deserved, he must indeed have been a rare specimen of the union of all excellence and talent. We transcribe that portion of it which celebrates his excellencies as a judge:—"The dignity of this weighty office sat easy and graceful upon him. In his person and countenance there was plainly to be seen a fine exterior figure of that inward worth, which every body experienced whom their own wants pressed, and his affability moved, to approach him. No sooner was he mounted on the bench, but all honest men found with pleasure that righteousness and truth were the only pleaders that could be prevalent before him. Every poor and just man, though almost sunk by the weight of oppression, entered the Court of

Chancery with an air of confidence, because he knew, as sure as he came there, so sure he should be *eased of his burthen*, and depart with a light and comforted heart. The party that was cast, never went away without a full and plenary conviction of his having been in the wrong; and if any person appeared guilty of injustice, the Chancellor laid it open in such a manner that he rather excited in the person a compunction and remorse for his crime than any indignation at the discovery . . . . . The delay of the law, which used to be numbered as one of its greatest grievances, was by him turned into despatch; and he made his own labours the greater, to give ease to other people." This is tolerably warmly coloured; but the terms in which his oratorical powers are lauded are still more transcendant:—"As great as all his other talents were in him, they would never have had any thing like that force and efficacy which they ever carried along with them, if he had not been blessed with the gift of eloquence. It was the orator that lighted up the most shining parts both of the statesman and judge. His discourse might not improperly be compared to lightning: it was divinely beautiful, and yet powerfully strong; it gilded and adorned whatsoever it touched upon, but struck down every thing that opposed it . . . . . When he grew silent, oratory was struck dumb. But silent he can never be! No! all the memorable acts of his illustrious life still speak, and speak aloud, this one great truth—That whoever would be a fine gentleman, a judge, a scholar, or a statesman; that whoever would be a great man while he lives, and be esteemed so when he is dead, must necessarily become, in the first place, a good man." But prose, even so glowing, was insufficient for the due celebration of his fame. The age of elegy was not yet past; and Ambrose Philips (a staunch Whig) sung his praises in a regular ode of strophes and antistrophes, of which the opening stanza may be a sample sufficient to satisfy the taste of our readers:—

“ Wake the British harp again  
 To a sad melodious strain;  
 Wake the harp, whose every string,  
 When Halifax resigned his breath,  
 Accused inexorable death:  
 For I once more must in affliction sing,



One song of sorrow more bestow,  
The burthen of a heart o'ercharged with woe;  
Yet, O my soul, if aught may bring relief,  
Full many, grieving, shall applaud thy grief,  
The pious verse, that Cowper does deplore,  
Whom all the boasted powers of verse cannot restore."

Of Lord Cowper's legal and judicial character and qualifications we have already spoken. With regard to his merits and failings as an individual, the virtues of integrity and kind-heartedness appear to have been denied him by none; but of the strictness of his morality, or the depth of his religious impressions, there is perhaps less reason to entertain the most favourable opinion. He was a generous patron of literature and the fine arts; a handsome collection of pictures, formed by his taste, still adorns the seat of his noble descendants in Hertfordshire. But of his scholastic acquirements, independently of the learning of his profession, Swift did not perhaps give a very unjust report, when he designated him "a piece of a scholar." One of the most amusing anecdotists of those times (Dr. King) indeed affirms, that for a century and a half this country had boasted but two Chancellors who could be called really learned men—meaning, we presume, Bacon and Somers; and informs us that Lord Hardwicke even learned Latin after he arrived at the woolsack—which however we take to be a slight exaggeration.<sup>1</sup> Nor were Lord Cowper's powers of intellect, perhaps, of the highest order, or his grasp of mind to be at all compared with that of a Mansfield or a Thurlow. But whatever were his merits or defects in other points, in one capacity—as a consummate master of the external part at least of the art of oratory, he had scarcely a rival in his own time, and has had probably few superiors since. The elegance of his diction, the charm of his elocution, the graces of his manner, set off as they were by the advantages of an animated and pleasing countenance, and handsome person, atoned for the want of strength, and not unfrequently perhaps cast a veil over the scantiness of argument. Of the first, the mutilated remains in the *Parliamentary History* present us with a faint resemblance; of the latter we can know nothing but by the reports of his contemporaries. By them they were all loudly celebrated. The

<sup>1</sup> See *Life of Lord Hardwicke*, ante, vol. iii. p. 78.



panegyric pronounced by Ben Jonson upon Bacon was applied to him—that “he commanded when he spoke, and had his judges angry or pleased at his devotion. No man had their affections more in his power; and the fear of every man that heard him was lest he should come to an end.” “The Lord Chancellor Cowper’s strength as an orator,” says Chesterfield, “lay by no means in his reasonings, for he often hazarded very weak ones. But such was the purity and elegance of his style, such the propriety and charms of his elocution, and such the gracefulness of his action, that he never spoke without universal applause; the ears and the eyes gave him up the hearts and the understandings of the audience.” Duke Wharton’s rhapsodical encomiums we have already quoted. The poets also took up the praises of his eloquence. Pope, when in imitation of Horace’s “*Frater erat Romæ consulti rhetor*,” &c. he introduces his two brother serjeants bandying compliments, makes Cowper their model of a graceful speaker:—

“ ‘Twas ‘Sir, your wit’—and ‘Sir, your eloquence’—  
 ‘Yours, Cowper’s manner’—and ‘yours, Talbot’s sense.’ ”

Sir Charles Hanbury Williams, (or rather the uncertain author of a lively poem printed among his works, for it is wrongly attributed to him,) offering Sir Hans Sloane divers rarities to enrich his museum, enumerates amongst them

“ Some strains of eloquence, which hung,  
 In ancient times, on Tully’s tongue;  
 But which conceal’d and lost had lain,  
 Till Cowper found them out again.”

Ambrose Philips soars a higher flight;—

“ Hear him speaking, and you hear  
 Music tuneful to the ear;  
 Lips with thymy language sweet,  
 Distilling on the hearer’s mind  
 The balm of wisdom, speech refined,  
 Celestial gifts!”

These testimonies—others might be added—sufficiently attest the estimation in which he was held as an accomplished orator. The few specimens that remain of his written style, although pure and harmonious, certainly would not of themselves have prepared us to expect such high commendation. A few of his

familiar letters are preserved in the correspondence of Hughes the poet—they are easy and agreeable, and strongly display the writer in the light of an amiable and kind-hearted friend, but can make little or no pretension to merit as compositions.

As a public man, Lord Cowper's character may fairly claim the praise of an honourable and independent consistency, superior to the temptations of power and gain, although falling short undoubtedly of that higher principle of public conduct which soars above the connections and views of party—a principle admirable in theory, but the most difficult in the world to maintain stedfastly in practice; and the more so because its own good purposes are unattainable from the want of that strength of union which party only can exert. Cowper was, in truth, from first to last “a staunch Whig:” condescending to no mean compliances to secure his own personal aggrandizement, but not equally above engaging in the *tracasseries* of political strategics, for the advancement of the party whose general principles and policy he no doubt conscientiously believed the most conducive to the welfare of his country.

After the lapse of a century, it is in vain to seek for details of the private life even of an individual of the most eminent public station and character, unless they have been treasured up by some gossiping kinsman or intimate, or preserved in the form of autobiography, or at least in familiar correspondence. Of Lord Cowper's we know almost nothing. He is represented to us as a lively and agreeable companion—a *bon vivant*, until the failure of his health compelled him to abstinence—goodnatured, generous, and hospitable: but of the scenes or circumstances in which these qualities were called into exercise, little or nothing can be traced. Although he kept a diary for some years, it records little besides political matters:—it still remains in manuscript only, in the collection of the Earl of Hardwicke.

By his long and profitable career at the bar, and his various official emoluments, he realized, in addition to his patrimonial estate, an ample fortune, out of which he purchased the manor of Hertingfordbury, and built upon it, at a spot called Colne Green, a handsome house, which was pulled down in 1801, when the present more stately mansion

of Pansanger was erected. At Colne Green were to be seen (when Dr. Kippis's *collaborateur* in the publication of the *Biographia*, worthy Dr. Towers, went down to collect information about the family in 1789,) the purses which had contained the seals during the several years of Lord Cowper's chancellorship, which however were too few to be applied to the thrifty purpose to which good Lady Hardwicke devoted her lord's—the hanging of the state apartment. Among the pictures, there were three different portraits of the Chancellor by Kneller, which no doubt are still preserved at Pansanger.

Lord Cowper was twice (avowedly) married; first, to Judith, daughter and heiress of Sir Robert Booth, of London, who died in April 1705, and by whom he had one child only, a son, who scarcely attained boyhood: secondly, to Mary, daughter of John Clavering, Esq., of Chopwell in the county of Durham, who survived him a few months. By her he had two sons and two daughters; the former were William, his successor in the title, and Spencer, who entered the church and became Dean of Durham. The Chancellor's younger brother, Spencer, was not prevented by the heavy charge alleged against him in early life from attaining rank and repute both in his profession and in parliament. On his brother's elevation to the woolsack, he succeeded him in the representation of Beeralston, and sat afterwards for Truro; adhered with equal inflexibility to the Whig party, was a frequent and successful speaker, and one of the managers in the impeachments of Sacheverell, and of the rebel lords in 1716. On the accession of George I., he was appointed Attorney-General to the Prince of Wales; in 1717, Chief Justice of Chester; and in 1727, a Judge of the Common Pleas, retaining also, by the especial favour of the Crown, his former office until his death in December 1738. His second son, John, became the father of another William Cowper, of even greater celebrity than he whose career we have been recording—the poet of the Task.

---

ART. III.—LAW OF HOMICIDE.—THE SPA-FIELDS VERDICT.

---

It has been a favourite topic of reproach against the English people, that whilst they boast the superior excellence of their laws, the greater part of them are as ignorant of their nature, as the most ill governed nation in Europe. This fact, and it at least *has been* a fact, is variously accounted for by philosophers and jurists. Some theorists in education would ascribe it to the neglect of all useful learning in our system of instructing youth; some theorists in code-making, to the confusion and uncertainty inseparable from all unwritten judge-made law, which put a moderate knowledge of its details quite beyond the reach of ordinary sense and application; and some theorists in morals, to the natural selfishness of lawyers, who, from motives of personal interest, throw darkness and perplexity around their science in order that they may remain its sole interpreters and teachers. Yet the most bitter of these critics never ventured to affirm, that some portions of English law are not easy to be understood as well as excellent. Those portions, as might naturally be expected, are such as derive their origin from the good sense and good feeling of the old English character. Accordingly the law for the protection of property and life very early attained in this country a rectitude and certainty unknown to continental nations, but consistent with the sentiments of a circumspect and moral people. Our civil law, drawn from the dark and turbid sources of Norman feudalism, might preserve much of its original barbarity among better men and times, but our criminal law, though ever too harsh in its punishments, soon acquired a simplicity and equity in its principles and procedure suitable to a nation the most free and virtuous of the middle ages. Had we to select a branch therefrom more eminently than the rest deserving our commendation and respect, it would be that relating to homicide. Clear, just, and reasonable in its nature, plain and concise in its details, it is to be found in ordinary books, explained in ordinary language, intelligible to ordinary understandings. It is a law that he who runs may read, he who reads must comprehend, and he who compre-

hends must approve, accordant as it is with humanity, religion and good sense. At least so thought some of the best and wisest of mankind, themselves neither lawyers nor courtiers, but the declared unsparing foes of our gross legal and political abuses, but so it seems did not think a Spa-fields jury, a portion of the liberal press, or certain luminaries, some lawyers too, of the House of Commons.

The late verdict in the case of Robert Culley the policeman, from whatever cause we suppose it to proceed, is fraught with matter for wonder and alarm. Was it ignorance of the law? It is hard and distressing to believe that such ignorance could exist among any class of Englishmen, much less, among that respectable class from which coroner's juries are taken, in this age of general education; an ignorance which half an hour's reading, not of black-letter volumes, but of books easy to understand and procure, Blackstone or Burn, must remove. Was it disapproval of the law? Then is the case only the more distressing, for it indicates either a general disregard for the sanctity of human life,—the worst evidence of moral depravity, or a particular animosity against the agents of established power as such, the surest warning that that power is in danger of a violent subversion. The true position of the jury was probably between these two, but it is much to be regretted that the coroner was unable, or unwilling, so to explain the law of homicide, as to leave them altogether without the excuse of ignorance for their misconduct.

It will be the object of this article to shew, first, that the verdict of "justifiable homicide" had no shadow of legality to support it; secondly, to suggest what verdict might legally have been substituted for it; and lastly, to make some remarks on the subsequent proceedings of the Court of King's Bench in quashing it. In pursuing this course we have no hope of presenting to the reader many novelties, excepting, perhaps, on the last point, but it seems no unfavorable opportunity for arranging in a clear and concise form the law on the subject of homicide, or at least of homicide with design; homicide by misadventure only being quite beside our present purpose.

And for this it is necessary to lay down one elementary principle, which, plain and notorious though it be, we might sup-

pose the parties to the verdict and some of the commentators on it, had never heard of before. We shall not do it in language of our own, but in that of three distinguished authorities as showing how clear and how unanimous their opinion on this principle is. And first, what says Mr. Justice Forster, the author of the admirable “Discourse on Homicide,” containing almost every thing of value hitherto established on the subject?

“In every charge of murder, *the fact of the killing being first proved*, all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him, for the law presumeth the fact to be founded in malice until the contrary appeareth.”—F. C. L., 255.

The following are Blackstone’s remarks.

“We may take it for a general rule that all homicide is malicious and of course amounts to murder, unless when justified by the command and permission of the law, *excused* on the account of accident or self-preservation, or *alleviated* into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or if voluntary, occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the Court and jury; the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former how far they extend to take away or mitigate the guilt. For all homicide is presumed to be malicious, until the contrary appeareth upon evidence.”—Bl. Com. vol. iv. p. 201.

The implication of malice arises in every instance of homicide, amounting, in point of law, to murder, and the fact of the killing being first proved, all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him.”—East P. C. vol. i. p. 224.

The spirit of these passages may be thus briefly rendered. If A. kill B., it lies on A. to show that his act is less than murder. This presumption, that all homicide is murder, has been supposed by some a presumption contrary to that gene-

ral rule of law, which assumes all men to be innocent until proved guilty. But this arises from a confusion of ideas. No such general rule exists, if by the words "proved guilty," we understand a moral certainty of guilt to be meant, for such moral certainty is in most criminal cases not attainable. The law only presumes innocence until circumstances are shown from which guilt may be probably inferred, but then, not in homicide alone, but in all cases, it calls upon the person implicated to explain those circumstances in some way. Thus one having stolen goods in possession, is presumed from circumstances to have received them with a guilty knowledge, unless other circumstances show a probability of his innocence. Thus too a stranger found in a dwelling at night is presumed to have entered with a felonious intention, unless able to account for his presence there consistently with innocence. And so, when man meddles with so sacred a thing as the life of his neighbour, he is presumed to have done it without justification or excuse, for such is the moral probability unless the contrary be shown. Besides, to presume innocence in such a case must involve another presumption really opposed to the rule of law above mentioned, a presumption, namely, of the guilt of the person slain, for nothing, as we shall presently see, but a very high degree of criminality in the latter, could make his killing less than murder, and so a presumption on no evidence whatever would be preferred to a presumption on such strong evidence as the act of slaying itself affords.

Such then being the general principle, its application is easy to the late inquest. For although the rule laid down especially refers to juries having prisoners in charge, yet it is plain that coroners' juries also must be guided by the general rules of law toward the conclusions to which they come. Nor does it make any difference that the individual perpetrator of the act remains undiscovered, except indeed that there is less chance in such a case of circumstances transpiring which may remove the presumption of murder. And accordingly it is a matter of every day experience for coroners' juries holding inquest on a body slain, where the circumstances of death are altogether hid, to return a verdict of wilful murder against some person or persons unknown. And such ought to have



been the late verdict in Spa-fields, unless there was evidence before the jury making it probable at least that the author of Culley's death had some excuse more or less for his act. What that excuse must have been to support a finding of justifiable homicide is the point we have first to consider.

Hawkins, in his analysis of criminal law, the philosophic arrangement of which modern writers would do well to imitate, has laid down the following distinctions for the sake of clearness:—1st. That homicide against the life of another either amounts to felony or it does not. 2d. That which does not is either justifiable or excusable, that which does is either manslaughter or murder.<sup>1</sup> As no subsequent writer has questioned the propriety of this arrangement, we will adopt it here, and considering each of the four in its order, endeavour to ascertain under which the recent occurrence in Spa-fields arranges itself.

Justifiable homicide is considered by Forster, Blackstone, and other great authorities, as of three sorts only. It may proceed from unavoidable necessity; it may be committed by officers or others for the advancement of public justice; or it may occur in the prevention of some atrocious crime. In the last instance it is not intended to affirm that all crime, or even all crime amounting to felony, may lawfully be so prevented, but only certain felonies of a very high and atrocious nature, affecting person, and in some few cases property. Robbery, murder, rape, arson and burglary, are the examples given by Forster. No one will pretend that the slaying of Culley the policeman was a measure of prevention of this kind. Neither was it in promotion of the public justice by an officer or other person called on to assist in enforcing the execution of the law, in which case if the party killing can show that it was impossible otherwise to put the law in force, he has been held entitled to exemption from all punishment for that reason. If then it was justifiable homicide at all, it was so on the ground of unavoidable necessity, and our inquiry becomes limited to this, whether it was a necessary act of self-preservation. To constitute such, two things are requisite, first, that the person killing has no other means of saving his own life, and secondly, that he finds himself in so alarming a situation, without fault

<sup>1</sup> 1 Hawk. P. C. c. xxviii.



or misconduct of his own. For greater accuracy we quote the exact words of two eminent lawyers writing on this point.

“ Regularly it is necessary that the person that kills and in his own defence fly as far as he may to avoid the violence of the assault before he turn on his assailant.”

“ If A. assaults B. so fiercely that B. cannot save his life if he gives back, or if in the assault B. falls to the ground, whereby he cannot fly, in such case if B. kills A. it is *se defendendo*.” Hale’s P. C. v. i. pp. 481, 482.

“ In no case can a man justify the killing of another under pretence of necessity, unless he were wholly without any fault imputable by law in bringing that necessity upon himself.” East’s P. C. v. i. p. 235.

“ In no case can he substantiate such excuse if he kill his adversary even after retreat, unless there were reasonable ground to apprehend he would otherwise have been killed himself.” *Ib.* 285. And he quotes in illustration the case of Nailor, tried at the Old Bailey, 1704.

It will be immediately perceived, that supposing the meeting in Spa-Fields to have had any the slightest taint of illegality about it, a verdict of justifiable homicide was incorrect, because the person unknown who killed Culley was not there entirely without fault. But without resorting to this hypothesis, we may content ourselves with the inquiry whether there was any evidence to show that the killing was in self-defence, flight being impossible and life in all probability not otherwise to be preserved. Now there was much testimony to the violence and brutality of the police, to their ferocious and unprovoked assaults on unresisting people, to severe hurts and bruises inflicted by their staves, and to the impossibility of escaping from their attack, all avenues of flight being stopped. Admitting for the sake of argument, that the jury were quite right in believing that every tittle of this evidence was true, and in their opinion that the meeting was legal, and the conduct of the police therefore in all respects illegal, still no case is made out to justify the homicide in self-defence. The circumstances may be very strong, very extenuatory of the slayer’s guilt, but they do not amount, or indeed approximate, to proof that the act was one of unavoidable necessity. There being no evidence of violence on the part of Culley

individually, it would be a somewhat outrageous assumption, that because he acted in concert with a body engaged in the unlawful purpose of dispersing an innocent assembly, he was therefore a probable participator in the outrageous conduct of some members of that body, and so might be justifiably slain, because other policemen so acted that they might have been justifiably slain, but even such an assumption would be insufficient to support this verdict, for we maintain that there was no proof that any officer whatsoever made use of that degree of violence, which would have justified killing him under reasonable apprehension of immediate death.

But some will argue, and not without semblance of reason—It may be admitted that a subtle legal distinction exists between homicide justifiable and excusable, and the jury not understanding this, may have committed a verbal inaccuracy, but still they viewed the main question correctly, and the distinction which they intended to draw was in accordance with justice and common sense; they wished only to express their opinion, that the circumstances under which the homicide occurred, deprived it of its felonious complexion, and although they might perhaps more properly have employed the word excusable, their meaning was, that it neither amounted to murder nor manslaughter. To meet these remarks fairly we must again recur to our authorities.

Excusable homicide, as the very name denotes, implies some delinquency, however slight, in the perpetrator. It is of two kinds. That by misadventure or accident being quite beside our present purpose, it is sufficient to name only. The other, like one form of justifiable homicide, occurs in self-defence, but differs from it in some particulars, of which the chief is this, that entire blamelessness does not seem to be required of the party slaying, in all the circumstances which led to the homicide. Thus if one be engaged in an illegal act, but not of such a nature as to justify the killing him, and he be so violently assaulted that for the preservation of his own life he kills the assailant, such a homicide would be excusable, although it arose in the first place from the misconduct of the slayer. If therefore, Culley the policeman so attacked the person unknown, that the latter was compelled to kill him in self preservation, the act, even if the meeting was illegal, and

the police therefore justified in dispersing it with no unnecessary violence, could be no more than excusable homicide. Or to take the instance quoted in the books. "A. being assaulted by B. returneth the blow, and a fight ensueth. A. before a mortal wound given, declineth any further conflict, and retreateth as far as he can with safety, and then in his own defence killeth B.; this is excusable self-defence; though saith Stanford, A. had given several blows not mortal before his retreat."<sup>1</sup> And this likewise shows that there is no absolute necessity for the slayer's being altogether without misconduct in the transaction, for as no one is legally justified in engaging in a personal conflict, so here, as before, the party is not entirely blameless. But all authorities lay down that the rule is as inflexible with regard to excusable as justifiable homicide, that the killing shall take place under the fear of immediate death. Thus Forster says: "He who in the case of a mutual conflict would excuse himself upon the foot of self-defence must show, that before a mortal stroke given he had declined any further combat, and retreated as far as he could with safety: and also that he killed his adversary through mere necessity, and to avoid immediate death. If he faileth in either of these circumstances he will incur the penalties of manslaughter."<sup>2</sup> And Blackstone says, "to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant."<sup>3</sup>

If the law be so, and we no where find any authority to the contrary, our previous argument applies equally to the present case, and the necessity of killing in self defence not appearing from the evidence, a verdict of excusable homicide could not be sustained, although such verdict would make the legality or illegality of the meeting an immaterial question, while that really given requires the assumption of its innocence.

To discuss properly the topic of manslaughter a wider field of inquiry must be traversed, for the legality or illegality of the meeting itself becomes now a question of most serious import. As it is one of considerable difficulty, and likely ere long to undergo the decision of a very high tribunal, it would

<sup>1</sup> Forst. C. C. 277.

<sup>2</sup> *Ib.*

<sup>3</sup> Bl. Com. v. 4. p. 184.

be presumptuous to hazard on it a decided sentence here. We have however a strong opinion that considering the purposes for which the assembly was summoned, it cannot be considered otherwise than seditious. The placards were addressed to the Members of the Political Unions, inviting them to meet at a designated place, preparatory to forming a national convention. This could be only taken to mean that they were to consult as to the best means by which such a convention could be established. If that then were illegal, so also must the meeting be. It has been said that convention is a word of very dubious import, and that even supposing it to indicate an alteration in the form of government, the conveners might intend no more than to petition to parliament to effect the necessary changes. But as the great instrument of working the greatest of modern revolutions was called a national convention, we must in common sense infer that they designed to frame some instrument to work some revolution, if indeed such very ignorant and misguided men could be said to design any thing at all. It is scarcely necessary to add, that the usual mode of overturning a government is not by requesting it to overturn itself. Insignificant and despicable, therefore, as this meeting was, it might be fairly held to be of a seditious nature, and the authorities acted lawfully, whether wisely or not, in suppressing it. But we own our inability to perceive how the illegality of the assembly was heightened by the unsigned proclamation warning all good citizens against being present. It might be very benevolent in Lord Melbourne, or any other anonymous placardist, to advise the public to stay away, but we do not see how this augmented the guilt of those who attended. As for the argument of Mr. Lamb, that the public might have felt assured that the proclamation was official, though it bore no signature, because it was printed by the king's printer, whose name it is a high offence to counterfeit, we cannot sufficiently admire its subtlety. Common understandings might suppose that if a London populace were so versed in the law of copyright as to draw this inference, they might also know enough about the law of sedition to stay away from such a meeting without warning. They went however, and in so doing committed, we fear, a punishable offence. Nevertheless, to avoid prejudging this, we will consider whether a verdict of man-

slaughter in Culley's case would have been proper, on the hypothesis that the meeting was illegal, and on that that it was legal also.

"Manslaughter," says Hale, "is the unlawful killing of another without malice either express or implied."<sup>1</sup> It is either voluntary or involuntary, but with the latter we have nothing to do here. The cases of manslaughter where not accidental, which most frequently occur, are those where death ensueth on a sudden affray and in heat of blood upon some provocation given or conceived. This provocation must, in a case of stabbing at least, amount to a blow, for no words of reproach, no actions or gestures without an assault on the person are sufficient to free the party killing from the guilt of murder, where he maketh use of a deadly weapon, but it is otherwise if the blow or weapon were not likely to occasion death, or where a fight with equal arms commences.<sup>2</sup> There is a case in the books strikingly illustrative of these distinctions. We quote it in the words of Mr. Justice Forster.

"There being an affray in the street, one Stedman, a foot soldier, ran hastily towards the combatants—A woman seeing him run in that manner cried out you will not murder the man will you? Stedman replied, what is that to you, you bitch? The woman thereupon gave him a box on the ear, and Stedman struck her on the breast with the pummel of his sword. The woman then fled, and Stedman pursuing her stabbed her in the back. Holt was at first of opinion that this was murder, a single box on the ear from a woman not being a sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear. And it was proposed to have the matter found special. But it afterwards appearing in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was held clearly to be no more than manslaughter."<sup>3</sup>

An extraordinary provocation then being necessary to reduce the offence of slaying to manslaughter, the Spa-fields jury could not properly return such a verdict, supposing that the meeting was illegal. For in that case, the policemen were lawfully engaged in endeavouring to disperse the mob, and there being no evidence that the individual Culley used unnecessary violence in so doing, whatever might be the conduct

<sup>1</sup> 1 Hale, P. C. 466.

<sup>2</sup> Forst. C. C. 290.

<sup>3</sup> *Ib.* 292.

of others, he could not by any possibility be inferred a participator in their excesses, because he was associated with them in effecting a lawful purpose. The proof of great provocation being therefore altogether wanting, the slaying must *prima facie* amount to murder. Doubtless had the perpetrator of the act been secured and brought to trial, he might have succeeded in showing that Culley in person first violently assaulted him, and the jury then might have been justified in finding a verdict of manslaughter on the evidence produced by him, but none such was presented to the minds of the coroner's jury.

But if the assembly was legal the case stands differently. The act of dispersion being then from the beginning improper, and also proved to have been accompanied by excessive ferocity and violence, a conclusion might be drawn as to the probability of Cully's participating in the outrageous mode of executing, as well as in the execution of the illegal interruption, and a coroner's jury might by possibility have been right in returning a verdict of manslaughter. That they would have been right, we are very far from affirming, for even then it would have been a very strong and strange assumption, and seemingly contrary to some legal principles, thus by implication to charge Culley with the most outrageous proceedings of his fellows, in the absence of all direct evidence against him. Besides it ought further to have been made matter of grave consideration, how far the circumstance of the slayer's being armed with a deadly weapon was important, as indicating an evil intention, previously conceived, of putting to death any person who should interfere with the bearer's proceedings, which evil intention is the very test and characteristic of the crime of murder. It must be admitted, however, that the fatal instrument might have been brought with the design of using it in the event of a deadly attack only from persons similarly armed, and that its dreadful misapplication arose on the heat of the moment. On the whole we think it may be granted, that the Jury might have returned a verdict of manslaughter, at least, without breach of their oaths to decide according to the evidence, although the unlawful nature of the assembly, the absence of all direct testimony concerning Culley, and the description of weapon employed, might all tend to make a different verdict the right one.

We began this argument by showing that the law presumes every slaying of a human being to be murder unless the contrary appear from the circumstances. It is therefore unnecessary here to enter into definitions or examples of that crime. Sufficient for our present purpose is the fact, that all homicide not justifiable or excusable, or of the lighter cast of felony termed manslaughter, is of necessity murder. In analysing the former three, we have in fact given a negative description of the last, and shall therefore forbear a positive one, as needless waste of words. It will be seen that we have also saved some time and trouble, by assuming throughout that all the testimony adduced at the late inquest to prove the general misconduct of the police was accurate, notwithstanding the manifest inconsistency and falsehood, and the intemperate and malignant spirit with which many parts of it were given. The jury had however the misfortune to believe it, and are rather to be pitied than blamed on that account. By taking the truth of the whole for granted, the question has been raised in the most favourable mode for them.

It now remains to consider the subsequent proceedings of the Court of King's Bench in relation to this verdict, which was returned on Monday May 20th, and was to the following effect. "We find a verdict of 'justifiable homicide' on these grounds, that no riot act was read, nor any proclamation requiring the people to disperse, that the government did not take the proper precautions to prevent the people from assembling, and that the conduct of the police was ferocious, brutal, and unprovoked by the people." On May 29th a certiorari to remove it into the Court of King's Bench was granted on motion by the Solicitor General, and on May 30th it was, also on his motion, quashed.

Some difficulty seemed to be felt both on the part of the Court and the mover on this occasion. In making his first application, Sir John Campbell is reported to have said, that he believed the crown was *virtute officii* entitled to a certiorari, a phrase we do not quite understand, but that he had thought it better to move for it in this public way. The Lord Chief Justice felt a difficulty as to whom the rule should be served upon, the coroner not being charged with any misconduct. On the subsequent quashing of the inquest the Court seemed embar-



rassed by doubts, as to the extent of their jurisdiction for questioning apparent error only, or further the merits of the verdict, although they must be taken to have quashed it on the former ground alone. Perhaps these uncertainties, and the lack of precedents to produce on the part of the Solicitor General, may have served to confirm some persons in the belief that the Court of King's Bench exceeded its powers in this act. So at least it has been gravely asserted by members of the House of Commons, some of them lawyers too. Mr. Godson in particular said, or was supposed to say, that as a lawyer he did not hesitate to declare, that no legal power could quash a verdict of this nature. There are nevertheless abundant precedents of such proceedings in the books, and as the right has been so seriously questioned, we shall take leave to quote the most remarkable:

1. Barcley's case, 2 Sid. 101, A. D. 1658. The inquisition finding a suicide *felo de se* was quashed, for the coroner's refusing to hear witnesses on the part of the administrator, to show the insanity of the party, or as the old law French has it, *Pur ceo que le Coroner n'ad allow Counsel pur l'administrat le Court ne vole suffer l'Inquisition destre File.*

2. Anon. 3 Salk. 101, reported as *Rex v. Parker*, 2 Lev. 140. 27 Car. II. A case precisely in point. The inquisition found that W. R. *felonice seipsum in rivum misit et seipsum emergit*, et sic seipsum *murdravit*. *Emergo* meaning to emerge only, and being an evident blunder for *immergo*, it was moved to quash the finding, on the ground of defect on the face of it, *as the conclusion was not warranted by the premises.*

3. *Rex v. Bond*, 1 Str. 22. A motion was granted to stay the filing of an inquisition taken *super visum corporis* dug up after five years, when by the coroner's advice and direction a verdict of *felo de se* was found. The ground of complaint was the misconduct of the coroner.

4. *Rex v. Aldenham*, 2 Lev. 152. 27 Car. II. An inquisition was quashed for the want of the word *murdravit*, that being held essential to a finding intended to be one of wilful murder.

5. Anon. 12 Mod. 112. 8 W. III. An inquisition was quashed on motion, the ground of complaint being uncertainty, as the verdict commenced by stating *Nos certe credimus* that the cause of death was so and so, instead of affirming it absolutely.

6. *Rex v. Stukeley*, 12 Mod. 493. This was an information against the coroner, for his misconduct in taking some of the jury off the inquisition, after they had been sworn, and proceedings had commenced, and substituting others in their places. The Court quashed the inquisition.

7. *Regina v. Clerk*, 1 Salk. 377, reported also 7 Mod. 16, 1 Ann. An inquisition being removed into the Court of King's Bench was quashed, because the nature of the wound was not fully set forth, nor the name of the person that died of it.

8. *The King v. Evett*, 6 B. and C. 247. The inquisition omitted to state the place where the death happened, or where the body was found; the names of the jurors were not inserted in the body of the inquisition, and it was subscribed by them with the initials only of their Christian names. It was quashed for these defects.

9. *The King v. Deputy Steward and Coroner of London*, Appendix to *Jarvis on Coroners*, p. 408. The inquisition having been removed by certiorari, there was a motion to quash it on the ground of uncertainty. This was the melancholy case of the persons killed by the falling of the Brunswick theatre, and the object of the application was to escape the payment of a heavy deodand on the materials. The uncertainty alleged, was the not stating distinctly what part of the materials caused the death, or the precise value of them. The objection was allowed, and the inquisition quashed accordingly.

Here are surely sufficient examples of quashing inquisitions, two for misconduct of the coroner, but the rest for defects on the face of them. In one of these the defect stated, was drawing a conclusion not warranted by the premises. And this is precisely the case with the verdict of Spa-fields. The omission to read the riot act, or call on the people to disperse; the neglect to take precautions to prevent the meeting; the ferocious misconduct of the police, were not each or all of them 'premises from which such a conclusion as "justifiable homicide" could be drawn. The Court of King's Bench had therefore full power, and did right to quash the verdict for its patent incorrectness. Had the jury contented themselves with their strange inference, without giving any reasons for it, the question had been very different. In their contest with

the coroner to place those reasons on record, they showed at once their honesty and ignorance. Had they in accordance with his wishes omitted to explain their motives, the Court above must have let their verdict stand, or assumed to itself the somewhat dangerous right of retrying the question on its merits, a right which there is little or no precedent for, and which it seems more constitutional that they should not possess. But as the matter stands, they cannot be considered as having at all claimed to themselves this power, and have done no more than had been done before in repeated instances, without the propriety of the act being questioned or impugned.

It is remarkable as this inquest has provoked so much discussion, that so little has been said by any party as to the necessity of having a new one. Yet it is not absolutely clear that such ought not to take place as matter of course. Indeed there is some authority in support of such a notion. In *Rex & Regina v. Bunney*, 1 Salk. 190, it is stated that "If a coroner's inquisition be quashed, he must take a new one, *super visum corporis*, for when an inquisition is quashed, 'tis, as if no inquisition had been taken." And in *Regina v. Clerk* above quoted, it appears that after the body had lain seven months, the coroner took it up again and had another inquisition found. Holt, C. J. seems in some degree to have admitted his right to do this under certain circumstances, for he said "The body might be dug up again, but not at such a distance of time, for it was a nuisance and might infect people. In *Barcley's* case there was the leave of the court for that purpose." At last it was agreed to traverse this second inquisition and try it at the assizes. The better opinion, however, seems to be, that the leave or direction of the Court of King's Bench is requisite for the holding of a second inquisition. At least there are many precedents for the court's so directing. This new investigation may be before the justices of the district instead of the coroner, as in *Rex v. Aldenham* above quoted, indeed in case of the coroner's misconduct having vitiated the first inquest, it has always been so. One thing is absolutely indispensable, that the second inquisition, like the first, should be *super visum corporis*,<sup>1</sup> and that the body of course should not be so far decomposed as to render the cause

<sup>1</sup> *Rex v. Stukeley*, 12 Mod. 493.

of death unascertainable. The progress of natural corruption must therefore render further inquiry impossible, unless very speedily insisted on.

Hawkins, no insignificant authority, has made a difference with regard to the holding of the new inquisition dependent on the cause of quashing the old one. He says that "where the coroner's inquisition is quashed for defect *of form only*, he may and ought to take a new one."<sup>1</sup> But we have been unable to find any precedents in support of this distinction.

We cannot conclude without a few remarks on the recent discussion in the House of Commons. We can fully understand and sympathize with the sentiments of certain honourable gentlemen, when the rights of the public are violated by power, or their persons insulted by its minions, and we are not surprised that those who believe the evidence on the late inquest should evince a strong feeling of indignation. They are quite right with such a belief, as the friends and champions of the people, to call the attention of their representatives to the matter, and to express, in the severest language, their disgust at the police who perpetrated, and the government who sanctioned, such atrocities. But while we give them every credit for sincerity and rectitude of purpose, it is very difficult to understand how any degree of zeal could stimulate persons not utterly blinded by party spirit to such assertions as have been made on this occasion. To hear educated men, whose business it is to make the law, and many of them to assist in its administration, gravely asserting that the Spa-fields verdict was in accordance with that law, and its reversal in opposition to it, is a somewhat heavy tax on our powers of endurance, and has some tendency to excite a stronger feeling than astonishment. Having looked with some attention through the speeches delivered in support of these propositions, we are unable to extract from them any thing like an argument, though there is good store of abuse and declamation. One remark, attributed to Messrs. O'Connell and Godson, might, it must be admitted, under other circumstances, have been material. Those gentlemen objected that the misconduct, if there was such, was on the part of the coroner and not the jury, inasmuch as the heading put by the former to the inquisition that "Cully was

<sup>1</sup> Hawk. P. C. vol. ii. c. 9, s. 53.

there in the peace of God and the King, and slain in the execution of his duty," was quite inconsistent with the verdict itself, and must have been done without the knowledge of the jury. Had the Court of King Bench quashed the inquisition on that ground, this observation would have been highly pertinent, but it does not appear that their attention was at all directed to it: on the contrary, they decided entirely on the inconsistency between the reasons and the conclusions of the jury.

The advocates of the verdict, if they showed a lack of knowledge and judgment, displayed abundant animation and fervour, whilst the defence of government was, as its defences but too often are, languid, confused and inefficient. Some arguments were brought forward surprising even for the House of Commons, where, judging from the quantity produced, it might be supposed that there existed some extraordinary premium upon nonsense. It was seriously insisted that no hardship could possibly attach to the quashing of this verdict, as it was a thing of every-day occurrence for a superior tribunal to overrule the decisions of the courts at Westminster, and those in turn of juries and magistrates. Now if there be in English law a principle more established than that which subjects the decisions of juries at Nisi Prius to the revision of the courts in bank, it is the principle which forbids such interference in all criminal cases. Those who can perceive any analogy between the reversal of a civil verdict, founded as that is almost always upon mistakes in law, and the reversal of a criminal verdict, which is a finding of facts alone, might as well go on to contend that the jury who try an action of assumpsit would have no right to complain of being forbidden to assess the damages, because the jury, who try a case of murder, are forbidden to ordain the punishment. It is not by such arguments that the late proceeding in the King's Bench is to be defended, but simply by the fact, that as the supreme court of criminal justice it is bound to take cognizance, not of the opinions formed upon evidence by inferior tribunals, for that would be to interfere with a most important bulwark of English liberty, but with their misconduct in discharge of their duty, or with their blunders in the manner of discharging it, which latter was the case of the Spa-fields jury.

We have endeavoured throughout to discuss this question fairly. Without political bias or purpose, it is no part of our business to contend that the police did not act with unprovoked brutality, or that the jury and their vindicators were not in intention honest. We affirm only that the verdict of Justifiable Homicide was beyond all doubt contrary to law, and the Court of King's Bench beyond all doubt empowered to quash it. But we must add, that it is much to be regretted that the jury were not better instructed by the coroner as to the principles of the law respecting homicide, and that their defenders in the House of Commons, who cannot plead equal want of knowledge, should have spoken of their errors in language of justification instead of palliation and excuse. Such is not the way to serve the cause of truth or liberty. If the law be bad, which we do not for a moment admit, let it be altered with all speed, but while it endures, let not those who violate or mistake it, be taught to fancy themselves the martyrs of persecution instead of the victims of their own ignorance.

S.

---

#### ART. IV.—ON THE VESTING OF ESTATES.

---

WE beg to refer our readers to an article on this subject in our fourth volume, p. 61. We here propose to review the principle of the cases there collected and stated, and to lay down some general rules which the practitioner may safely and conveniently carry about with him. If land be devised to A. for a chattel interest, as during the minority of B. or till B. attains twenty-one, for the benefit of B. or for a stranger, and when B. attains twenty-one, i. e. when the chattel interest determines, then to B. in fee, the remainder vests absolutely in B. on the death of testator;<sup>1</sup> and in case of his, B.'s death, after

<sup>1</sup> Boraston's case, 3 Rep. 19. Manfield v. Dugard, 1 Eq. Ca. Ab. 195. S. C. Gilb. Eq. Rep. 36. Taylor v. Biddall, 2 Mod. 289. Denn v. Satterthwaite, 1 W. Bl. 519. Goodright v. Parker, 1 Mau. & Sel. 692. Stanley v. Stanley, 16 Ves. 506. Warter v. Hutchinson, 5 Moore, 143. S. C. 2 Brod. & Bing. 249; and 1 Barn. & Cres. 721. Doe v. Lea, 3 T. R. 41.

the testator and before twenty-one; the lands descend to his heir at law.<sup>1</sup>

And the result is the same if the remainder after the chattel interest be given to two or more as tenants in common, instead of one person.<sup>2</sup> And on the death of any such tenant in common during the lifetime of testator his share lapses to the testator's heir;<sup>3</sup> and on the death of any such tenant in common after the testator, but during the existence of the chattel interest, his estate descends to his heir at law.<sup>4</sup>

All the cases just cited may be explained and justified by an observation of Sir Edward Coke's in *Boraston's case*, the parent of the class, that in them the adverbs *when* and *then* refer to a thing which must of necessity happen, i e. the determination of the previous chattel interest, and that they only demonstrate the time when the remainder shall vest in possession, and do not prevent its vesting on the death of testator.

We now enunciate a proposition which depends upon reasoning very different from that which supports the cases just cited. If land be devised to A. for life, and after his decease to B. in fee if he shall attain the age of twenty-one years, and in case he should die under that age, then over,<sup>5</sup> or, if after A.'s life estate the devise is to his children as tenants in common *at or when and as they shall respectively attain* the age of twenty-one years, and in case A. should die without children, or such children should die under twenty-one, then over,<sup>6</sup> the remainder, on either supposition, vests on the death of testator, subject, of course, to the executory devise over.

Now upon what ground did the Court in *Bromfield v. Crowder*, upon which case the subsequent ones professedly depend,

<sup>1</sup> *Manfield v. Dugard*, *Denn v. Satterthwaite*, *Goodright v. Parker*, *Taylor v. Biddall*, *Doe v. Lea*, *supra*.

<sup>2</sup> *Goodtitle v. Whitby*, 1 Burr. 228. *Doe v. Underdown*, Willes, 293, 301. *Edwards v. Symonds*, 6 Taunt. 213.

<sup>3</sup> *Doe v. Underdown*, *supra*.

<sup>4</sup> Willes, 301. *Edwards v. Symonds*, *supra*. In this case it was given to the survivors and survivor, but the survivorship was referred to the testator's death.

<sup>5</sup> *Bromfield v. Crowder*, 1 N. R. 313, confirmed by the Master of the Rolls, then by the Lord Chancellor, and afterwards by the House of Lords, see 5 Dow, O. S. 215.

<sup>6</sup> *Doe v. Nowell*, 1 Mau. & Sel. 327, affirmed Dom. Proc. 5 Dow, O. S. 202. *Farmer v. Francis*, 2 Bing. 151. S. C. 2 Sim. & St. 505. *Machin v. Reynolds*, 3 Brod. & Bing. 131. S. C. 6 Moore, 455.



hold that a remainder after a life estate was a vested estate, though limited *if* the remainder-man attain twenty-one? We find no reason given except by Sir James Mansfield, C. J. In the case before him, *Bromfield v. Crowder*, the tenant for life died, leaving the remainder-man B. an infant, and consequently if B.'s estate had been held to be a contingent remainder dependent on his attaining twenty-one, it would have failed altogether. The Chief Justice said, "this is an immediate devise to B. to take place on the death of the tenant for life." "If so," arguing on this assumption, he continued, "we must either break in upon the terms of the will, or give them effect. In the latter case, there is an end of all argument about the word 'if.'" The learned judge thus disposed of the troublesome *if*; "it cannot stand consistently with the intention of the testator," which, as he observed, is the guide in the construction of wills. In conclusion, he said, "no doubt the general meaning of the word 'if' implies a condition precedent unless it be controlled by other words; but in this case, *there is a variance between the expression and the meaning.*"

The result of this reasoning, and it is the only reasoning we can find in any of the lastly cited cases in support of their proposition, seems to be, that the conditional words *if*, *when*, &c. shall not make a devise contingent unless the contingency appears to have been contemplated by the testator. It must be admitted, that rejecting the "expression," and adopting the "meaning," of the testator as the ground of decision is rather a dangerous expedient, and cases decided on such a ground cannot serve as precedents unless we have before us almost the same wills as those decided upon. The present Master of the Rolls, Sir J. Leach, in arguing in the House of Lords against the decision in *Bromfield v. Crowder*, saw the matter in the same light; "the Court below," he said, "decided on conjecture and made a wiser will; but courts of justice cannot properly make wills for the parties."<sup>1</sup>

So, if the devise be immediate, without any preceding life estate; as if land be devised to J. M. when he attains twenty-one years, to hold to him, his heirs and assigns for ever: but in case he should die under twenty-one, then over. Here it was contended that the estate of J. M. was contingent, but the

<sup>1</sup> 5 Dow, O. S. 209.

Court of King's Bench thought themselves bound by the preceding authorities, and decided that it vested on the death of testator, though J. M. was then under twenty-one.<sup>1</sup> This decision confirms the view we have taken of the principle of the above cited cases, that a devise will not be deemed contingent merely because the testator qualifies it with some conditional expressions relating to the attainment of a certain age by the devisee.

We may observe, that Mr. Jarman, in his edition of Powell's *Devises*, accounts for these decisions we have just stated by their being followed by a limitation over in case of the death of the devisee under the age mentioned,<sup>2</sup> but we cannot find that this reason has been used by any of the judges, and we confess we cannot see its force; to use the words of Sir William Grant, when this argument was applied to show that the devise was contingent, "it is sufficient to say, that the event upon which an estate is given over cannot determine what is the event upon which it is to vest."<sup>3</sup>

In *Doe v. Nowell* the devise was to J. R. for life, and after his decease "to and among his children equally at the age of twenty-one and their heirs as tenants in common, but if only one child shall live to attain that age, to him or her and his or her heirs at his or her age of twenty-one years:" and in case J. R. should die without children, or such children should die before twenty-one, then testator devised the property over. J. R. had four children, who all survived him, and we have seen that they were held to take vested estates on their birth, and this on the authority of *Bromfield v. Crowder*, because it could not be the intention of the testator that if J. R. died leaving all or any of his children under twenty-one, that their estates should fail. This decision seems at first sight to strike "at the age of twenty-one," out of the devise; but circumstances may be supposed when these words would have effect. For instance, if J. R. had died leaving all his children him surviving, but two or more of them under twenty-one, and then one of the minors died, to whom would his share go? Of course, if the shares of the children vested in them on their birth or at the death of testator for all pur-

<sup>1</sup> *Doe v. Moore*, 14 East, 601.

<sup>2</sup> Vol. ii, p. 221.

<sup>3</sup> 16 Ves. p. 506.

poses, the share of the deceased minor would descend to his heir at law, and thus the eldest surviving son would take two shares instead of one. But would not this be contrary to the expressed intention of the testator, that the children who attained twenty-one should take equally? And further, suppose the eldest son of J. R. had died under twenty-one, leaving issue, and then another child of J. R. had died under twenty-one, without issue, the share of such child would descend to the issue of the eldest son, but what if a third child should die under twenty-one without issue, leaving only one child of J. R. to attain twenty-one, would not such only surviving child be entitled under the express words of the will to all the premises, and so it would be necessary that the shares which had previously descended to the issue of the eldest son should be divested and revert. Thus, if one child only attained twenty-one, he would take the whole, but if two attained that age, each might only take one fourth of the premises. But this is plainly against the intention of the testator, who wished to benefit all his children who attained twenty-one equally, and did not regard the issue of those who might die under twenty-one; for he expressly says, if three of the children of J. R. die under twenty-one, the survivors shall take all. To make, then, the decision that the children took vested estates on their birth consistent with the expressed intention of the testator, we must hold further, that the shares of the children were subject to be divested on their deaths under twenty-one in favour of the survivors equally, and thus the insertion of the condition of attaining that age appears useful. We are not aware of any decision on this point, but the opinion we have expressed seems to have been that of Sir Samuel Romilly.<sup>1</sup>

We shall only observe, in conclusion, that if the age of a devisee or any other circumstance be part of the expression by which he is described and with which he must be identified, he can take no estate till such age or circumstance be fulfilled. Thus a testator directed that "the son of his daughter who should first attain the age of twenty-one years, should, on attaining such age, change his name for that of Elwes, and he then devised "to the *said* son (i. e. the son who should first attain, &c.) of his daughter, on his attaining the age of twenty-

<sup>1</sup> See his argument in *Doe v. Nowell*, 5 Dow, O. S. 220.

one years, and changing his name to Elwes, all his freehold lands and hereditaments, to hold to him, his heirs, and assigns for ever." The House of Lords, reversing the certificate of the Court of King's Bench confirmed by Vice-Chancellor Leach, decided that no son of the daughter could take a vested estate till he attained twenty-one and assumed the name of Elwes.<sup>1</sup>

We will add to the foregoing observations an opinion lately given by a conveyancer, which embraces many of the points to which we have adverted, and it may be useful as an example. A testator seised of two estates, which we will denominate X and Y, made his will, the substance of which is shown in the opinion we transcribe.

" 1st. As to the premises marked X.

" These, together with those marked Y, are devised unto and to the use of trustees in fee in trust for testator's wife, Jane Morpeth, for life, and after her decease for Robert Morpeth (testator's eldest son and heir) for life, and after his decease for 'all and every child and children of his said son Robert Morpeth, in equal shares, their respective heirs and assigns, as and when they should attain the age of twenty-one years,' with a devise over in case of the death of all such children under twenty-one. Robert Morpeth having survived Jane Morpeth, his mother, is dead, having had seven children, all living at the death of testator or born subsequently, two of these children are since dead under twenty-one, and two are still minors. Upon these facts, I am of opinion, that the seven children of Robert Morpeth took vested estates or interests in the premises marked X, as tenants in common in fee upon the death of testator, or upon their births after his death; this I think is clear, as well on the authority of *Doe v. Nowell*, 1 Maule & Sel. 327, affirmed in the House of Lords by Lord Eldon, and *Farmer v. Francis*, 2 Bing. 151, confirmed by Leach, V. C., 2 Sim. & St. 505, as on the ground, that it was not contemplated or intended by the testator that there should be any interval between the determination of the life estates and the estates given to the children. But two of the daughters of Robert Morpeth having died since the testator under

<sup>1</sup> *Duffield v. Duffield*, 1 Dow, N. S. 268. S. C. 3 Barn. & C. 705; 1 Sim. & St. 239.

age, the further question arises whether the shares descend to their eldest brother as their heir at law, or whether such shares were divested and devolved upon the surviving children as tenants in common; and, I think, but for this I can find no express authority, that the latter is the better conclusion. It was clearly the intention of the testator that all the children of Robert Morpeth who attained twenty-one should take equal shares, and I think the words of the will are quite sufficient to effectuate this. It is true, that in case these daughters or either of them had died under twenty-one leaving issue, this construction would have deprived the issue of their parents' share, but it is sufficient to say, that the testator either did not regard or forgot to provide for such a case, for if all the children had died under twenty-one, though all or some of them had left issue, it is clear the devise over would have taken effect. Upon the whole, then, I am of opinion, that George Elder and Frances his wife, formerly Frances Morpeth, one of the daughters of Robert Morpeth, and who hath attained twenty-one, are in right of the said Frances entitled to one undivided fifth part of the premises marked X, for an estate of inheritance in fee-simple in possession, and may by the death of the two minors or either of them under age, become entitled to a further share.

“ Next as to the premises marked Y.

“ These, after the death of testator's wife and of his daughter Jane without children, (who died in his, testator's lifetime, unmarried,) are devised in trust for all and every the child and children of testator's sons Robert and John Morpeth, their respective heirs and assigns, as and when they should attain the age of twenty-one years, in equal shares as tenants in common, but there is no further limitation except the residuary devise of real and personal estate upon an absolute trust to sell to pay debts, and to divide the residue between testator's three children. John Morpeth, it appears, is dead, having had five children, all living, I assume, at the death of testator, or born subsequently before the death of testator's widow, or before the eldest child of Robert Morpeth attained twenty-one years, whichever of those events last happened: two of these five children are since dead under twenty-one, and the other three are living but all minors. Thus there have been in all twelve

children of Robert and John Morpeth, and I am of opinion, for the reasons stated above, that these children, on the death of testator, or their respective births, took vested estates or interests in the premises marked Y, as tenants in common in fee, subject to be divested on their dying under twenty-one, and as four of these twelve children are dead under twenty-one, George Elder and Frances his wife, in her right, are entitled to one eighth share of these premises for an estate of inheritance in fee-simple in possession, and may by the death of the five minors, or any of them under twenty-one, become entitled to a further share.

As I think the trustees take the legal estate in fee under the will, they are entitled to receive the rents in trust for the children of Robert and John Morpeth; and each of the five children of Robert Morpeth is entitled to an equal fifth part of the rents of the premises marked X; and on the death of the testator's widow, the children for the time being of Robert and John Morpeth become entitled to the rents of the premises marked Y, in equal shares.

*W.*

---

ART. V.—PRESCRIPTION AND CUSTOM. (2 & 3 Wm. 4, c. 71.)

---

A VERY important and highly beneficial statute, relative to *prescription* and *custom*, has recently come into force; but it does not appear to have attracted that attentive consideration, which the nature of its provisions demands. Our present object is shortly, and in a familiar manner, to point out the defects which this enactment was meant to remedy, and the way in which the legislature has proposed to obviate those defects; advert, at the same time, to some matters of practical interest, collateral to the main subject and nearly affecting it.

*Prescription* is one means by which property may be acquired, and signifies immemorial or long exercise of any rights of property. Such, at least, is the general signification of this term; but its technical meaning in the English law is much more narrow, being restricted both as regards the *kind of property*, in respect of which a claim is set up, and the

*nature of the claim* itself. Thus, *incorporeal* hereditaments only can be claimed by prescription; that is to say, rights to be exercised through or over the soil, but implying not the ownership of the soil *itself*. Such are rights of *way*, or to the flow of *water*, over my neighbour's park, or to have the spouts of my roof projecting over his land, or emptying themselves into his gutters. To *corporeal* hereditaments, such as mansions or fields, the law does not, in terms, recognize any right derived from long enjoyment; although the statutes of *limitations*, barring any complaint of usurpation after certain periods, indirectly establish such a right. For what matters it to a man in possession of estates, whether the law declares affirmatively his right, or only silences all who would impeach it? But further, it is not the immemorial or long enjoyment of every kind of right to incorporeal hereditaments, that the English law denominaes *prescription*; but the right must have been exercised in respect of, or as incident to, the *persons* of the possessors, being proprietors of other hereditaments, as by A. B. and his ancestors, or predecessors, owners of Black-acre. *Custom* differs from prescription, but as respects, the *nature of the claim*; which must be of a right as incident to the claimant, not in his personal and proprietary, but in his *local* or inhabitative, character. Thus the fitting instance of a claim by custom, given by Mr. Justice Blackstone in his Commentaries, is a claim to dance on a certain close, as being the right of the inhabitants of the parish of Dale.<sup>1</sup>

Prescription and custom, it has been seen, are (or more correctly *were*) each of them an *immemorial* exercise of certain rights; and the question therefore arises, what, in the English law, is meant by *immemorial*? The word "immemorial," and the phrase "time whereof the memory of man runneth not to the contrary," are in law synonymous: but yet the period of prescription, or *legal* memory, was long ago fixed; and it did not follow, that because the commencement of a man's usurpation could be shown, and so be brought *within* memory, therefore his claim by prescription or custom should be defeated. Time immemorial meant from the reign of Richard I.; a sufficiently long period of more than six centuries. For the purpose of defeating a claim by prescription or

<sup>1</sup> See 2 Bl. Comm. 263, 264.



custom made out *primâ facie*, by evidence of the beginning of the enjoyment, a man must therefore have shown such beginning to have been, at some time *since* that very remote era; and if he had done so, his resistance would have been successful. A *primâ facie* case of immemorial enjoyment was made out by proof, that the party claiming, or those from or under whom he claimed, or being in like circumstances as himself, had, without interruption, exercised the right in dispute for twenty years; and after such proof given, it lay upon the opposite party to rebut the presumption so raised.

It would doubtless have been highly inconvenient, if our municipal law had adopted the ethical maxim, that no right can be founded on an injury; and if enjoyment from the remotest periods had been held to confer no title, provided it could be proved to have begun in usurpation. This inconvenience results from the very nature of things, in which human testimony, and even documentary evidence, are so precarious and decaying, that the investigation of facts, after a comparatively short period, tends rather to an accidental than to a certain, or well founded, conclusion. The quieting of suits, the relief of the holders of property from eternal apprehensions, and the discouragement of visionary crusades against existing arrangements, as they have recommended and brought about our various statutes of limitations, so must, at all times, have urged the propriety of rendering prescriptions and customs, in process of years, indefeasible. At the same time, nothing could well have been more absurd, than to fix the time of legal memory at any given epoch; for, allowing the era to be just and proper when first adopted, the very supposition implies, that immediately afterwards it becomes unjust and improper, and grows more and more so each succeeding day. In fact, through the adoption of such a rule, it happens in course of time, that titles would have been about as secure, although no prescriptive rights had been acknowledged. For of what advantage can it be to the claimant of an easement, that his adversary is forbidden to carry his evidence further back than 650 years ago? As well, for all practical purposes, might he be restricted to the landing of Julius Cæsar in Britain, or the peopling of the island. And yet, until the 2. & 3. Wm. 4. c. 71. came into operation, the period of prescription continued to be from the reign of Richard I.

The evil that might have been apprehended from the prevalence of such a rule had, indeed, been considerably mitigated by an exercise of that sort of ingenuity, unhappily too characteristic of our lawyers of a former school, which delights tortuously to evade the force of a bad law, but fails to suggest the more simple and easy expedient of promoting its repeal. The method of evasion was this—After an incorporeal hereditament had been enjoyed twenty years, the law sanctioned the presumption, that a *grant* of the right claimed had been made, and that the deed or evidence of that grant (for a grant of such property must have been by *deed*) had been destroyed by accident. This was called presumption of a *non-existing grant*: and it was the practice to add to the plea of right by prescription, one of enjoyment under such a grant, showing the date of the supposed instrument, the parties' names, and other essential particulars, with as much form as though the deed had been produced to the Court.<sup>1</sup> This fact of a twenty-years' enjoyment, it is to be observed, was not conclusive in law, but only authorized the judge to submit to a jury the question of grant or no grant; and that question it was their province, under judicial direction, to decide.<sup>2</sup> It is clear, therefore, that this admitted doctrine of presumption did not wholly shift the period of prescription, from the twelfth century to twenty years before the bringing of the action. Still its operation was highly beneficial. Thus a plea of non-existing grant would not necessarily have been defeated, as a plea of prescription must have been, by mere proof, that at some period more than twenty years ago, the claimant either had not, or could not have, enjoyed the right claimed; for either of those facts would have been perfectly compatible with the presumption of a subsequent grant. To rebut the presumption, indeed, it would not only have been necessary to prove the commencement of the enjoyment, but further to show something in the manner of the commencement, precluding the notion of a grant: and to have effected this after a long enjoyment, very clear and decisive evidence would have been requisite. A direct and complete amendment of the law

<sup>1</sup> Hendy and others v. Stephenson and others, 10 East, 55.

<sup>2</sup> 2 Wms. Saund. 175, note.

was, however, loudly called for; and it has at length been effected by the statute before referred to.

The object of that act (2 & 3 Wm. 4, c. 71,) is clearly expressed in the preamble, which recites the meaning of the expression "time immemorial;" and that in consequence "the title to matters that have been *long enjoyed* is sometimes defeated, by showing the commencement of such enjoyment." The substance of the statute is comprized in the first three sections; the others being but ancillary to those going before. We shall, therefore, attempt, in the first place, to give the substance of those early sections under one view, and then briefly advert to the remaining sections in the order in which they occur.

The first, second and third sections of the statute have a fourfold effect. 1. They describe the kinds of property; and 2, the nature of the claims to such property, to which they relate. 3. They provide that after certain periods of uninterrupted enjoyment, such claims shall not be defeated in *one* particular way; and 4, periods are fixed, after which there shall be *but one* method of defeating such claims. The *kinds of property* referred to are rights of common, and other profit or benefit to be taken or enjoyed from or upon land (except the matters afterwards specially provided for, and except *tithes, rent and services*); ways and other easements; water-courses and the use of water, enjoyed or derived upon, over, or from any land or water; and lastly, the access and use of light to and for any dwelling-house, workshop, or other building: all which species of property are strictly *incorporeal*. The *nature of the claim* to any of these descriptions of property (except the access and use of light), for which provision is made, is thus declared by the statute, viz. "claim which may be lawfully made at the common law" (*i. e.* lawful claim), "*by custom, prescription or grant.*" By *grant*, thus used, a non-existing grant must be understood; for if a grant *in esse* were forthcoming, the grantee would have nothing to fear from proof of the time at which his enjoyment commenced. We have already explained, what sort of interest in incorporeal herditaments is claimable by custom, prescription, or non-existing grant. The nature of the claim to light is not defined by the act: there being, in fact, but one kind of claim.

The act, we have stated, mentions two classes of periods; one, after which a claim may be defeated in *any* way but *one*; the other, after which but *one* method of rebuttal is open. The former class of periods, with reference to rights of common; and other profit or benefit *taken* and enjoyed from or upon land (*profit à prendre*, as it is usually called) is *thirty* years; as relates to a way or other *easement*, and watercourse, and the use of water, *twenty* years: and the *one* way in which, after uninterrupted enjoyment during these respective periods, claims to such property shall *not* be defeated, is *showing the commencement of the enjoyment*—a method of disproof which constituted the evil of the former law of prescription, as shown above. The latter class of periods is made by doubling the former spaces, being *sixty* years where the former is thirty, and *forty* where that is twenty: and the *one* way, in which *alone*, after enjoyment shall have been had during these longer periods of time, claims founded thereupon shall be liable to be defeated, is proof, that the thing claimed was taken and enjoyed, or enjoyed, by some “consent or agreement expressly given or made, for that purpose, by *deed* or *writing*.” With reference to light, but one period is provided; and when the access and use thereof shall have been enjoyed twenty years without interruption, the claim shall be deemed absolute, unless some such consent or agreement, as we have just mentioned, shall appear to have been the foundation of the enjoyment.

It will be observed that, in the first place, the present statute gets rid of the great inconvenience attendant upon the former law of prescription; namely, the danger of titles claimed through long enjoyment being overthrown by proof of the time (however remote, if since the reign of Richard I.) when the enjoyment commenced: for after twenty years’ in most cases, and thirty years’ in others, uninterrupted enjoyment, *this* method of disproof is totally abolished. At the same time, no length of enjoyment shall be sufficient to exclude the evidence of a *deed* or *writing*, to show the commencement of the enjoyment, and, by the import of its terms, to rebut the presumption of a grant *in perpetuum*. And this is most fitting: for otherwise the owner of land could not grant any incorporeal right over his soil, for lives or a long

term of years, without incurring the danger of an involuntary and perpetual alienation. Considering also the difficulty of authenticating old documents, and the probability, if any deed or consent were made, that it would be in the possession of those who have enjoyed under it, this exception cannot cause any just apprehension to claimants.

The remaining sections of the statute, as before observed, are in aid and explanation of those which precede them; and they provide for the working of the bill. We will take them in order. The *fourth* section declares how the periods shall be computed; and what shall amount to an *interruption*: the enjoyment previously spoken of being an *uninterrupted* enjoyment. The time of the commencement of the *suit*, in which the claim shall be brought in question, is that, from which the computations backwards must respectively be made: and nothing shall be deemed an interruption, unless the matter shall have been acquiesced in, for one year after notice to the party interrupted, as well of the matter itself as of the person making or authorizing it.

The *fifth* section relates entirely to the *pleadings* in actions in which claims of the nature alluded to may be brought in question. It provides, first, for cases, in which such claims might formerly have been stated *generally*, as in actions on the case for disturbance of the enjoyment of an incorporeal hereditament;<sup>1</sup> and secondly, for those in which *special* allegations must have been made, as in actions of *trespass*, brought by the owner of the land against the person laying claim to an incorporeal hereditament over the land:<sup>2</sup> and lastly, dictates the method of pleading, in answer to allegations of *claim*, made in cases of the latter description. In the two former instances, the old law is virtually continued: general allegations of title are still sufficient, in cases in which they would have been so previously; and, in support, or rebuttal, of such

<sup>1</sup> In actions on the case, brought for the disturbance or interruption of an incorporeal right, it was sufficient for the plaintiff to aver, that he was possessed of certain premises, and being so possessed, was entitled to exercise such and such rights; without shewing *how* he became entitled. See 2 Chit. Pl. 799. a.

<sup>2</sup> If the owner of land had brought trespass against one who had come upon his land, supposing himself entitled to an easement there (e. g. a right of way) the defendant, in answer, must have set forth his justification specially: as, supposing that he claimed by *prescription*, that he had enjoyed "from time whereof" &c. 3 Chit. Pl. 1109, &c.

allegations, the statute is made evidence: special allegations must also be made, as before, though the *form* of them is altered; it being sufficient, instead of a right from time immemorial, to allege an *enjoyment as of right* by the *occupiers* of the tenement, in respect of which the claim is made, during such of the ~~before~~ mentioned periods as may be applicable, and without claiming in the name or right of the owner of the *fee*. Under the former law, all rights by prescription or custom must have been claimed, in pleading, as pertaining to the owner of the fee: for it could not have been supposed, that any estate, less than the fee, had existed (so as to have an incorporeal hereditament annexed to it) from time immemorial: but it will now be sufficient to aver, that the *occupiers* of the premises have, for a given length of time, enjoyed the right. This last provision, as to the form of pleading title specially, is not in imperative terms: the words are, "it shall be sufficient to allege," &c. It would therefore seem, that a plea of enjoyment from *time immemorial* would not be bad upon the face of it: though it may be a grave question whether, after such a plea, the defendant would not be liable to all the old methods of defeat. Such a plea would be larger than requisite: but, being of indivisible matter, and not capable of entire rejection, according to the ordinary rule the party pleading should be held to strict proof of it.<sup>1</sup> In answer to such *special* allegations of title as the statute suggests, the fifth section lastly provides, that, if the opposite party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter thereinbefore mentioned, or on any cause or matter of fact or law *not inconsistent with the simple fact of enjoyment*, the same shall be *specially* pleaded. We have restricted the application of this last clause of the fifth section to those cases only in which the right is alleged *specially*: for, although the terms of the clause are somewhat general ("and if *the other party* shall intend," &c.) yet the context seems to prove, that it was intended to bear this limited application only. Thus, in the first clause of the section, it is said "if the same" (i. e. the *general* allegation of title above alluded to) "shall be *denied*, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be ad-

<sup>1</sup> Leake's Case, Dyer, 365.



missible in evidence, to sustain, or *rebut*, such allegation." Now the general allegation of title (the propriety of which the act merely continues) was formerly *denied* by the general issue of "not guilty:" and it must be, therefore, presumed that it is this form of denial, and not any newly invented special traverse, in rebuttal, or support, of which the provisions of the act shall be evidence. Indeed, upon any other supposition the clause of the act just cited is nugatory: for if the provisoes, &c. in the act contained, and not being inconsistent with actual enjoyment, were specially *alleged*, then, *of course*, and without any aid from this provision, the matters referred to would be admissible in evidence.

The *sixth* section prevents any *presumption* being made in favour of a claim, in any of the cases mentioned in the act, upon proof of enjoyment for a *less* period of time than for such period, mentioned in the act, as may be applicable to the case and the nature of the claim. In framing this provision, the legislature may have had in view the method by which, as before shewn, the courts avoided, to a great extent, the then law of prescription, by *presuming* grants, after a period of time much shorter than that, after which alone a prescriptive claim was maintainable. It is, in fact, enacted, that unless a title to the kinds of property mentioned in the act be sustainable, under *its* provisions, on the ground of uninterrupted enjoyment, such title shall not be acknowledged under any judicial doctrine of *presumption*. Thus, where claims, by length of enjoyment, would be liable to be defeated in *any* way *but one*, or in *but one* way (as before shown), claims to the same rights, made on the score of any *presumption* whatsoever (as, for instance, presumption of a *grant*) will be equally, and in the same manner, open to rebuttal. The plea of *non-existing grant* is, by the operation of this section, rendered utterly *useless*: presumption (upon which that plea is founded) and prescription being put, as relates to the *time* requisite to support each, precisely upon the same footing. The plea will still, of course, be good in law, and upon the face of it: though, if pleaded in support of a claim to *profit à prendre* (mentioned in the first section of the act) no evidence of a less than *thirty*-years' enjoyment will be receivable in support of the plea: that being the shortest enjoyment, which can give a title, *on*



*the score* of enjoyment, to property of that description. In other cases, a *twenty-years'* enjoyment will be evidence: and an evidence not liable to be rebutted by proof of the commencement of the enjoyment.

The *seventh* section excludes from any computation all periods of infancy, idiotcy, lunacy, coverture and *tenancy for life*, on the parts of persons *otherwise* capable of resisting claims: and also the period of the pendency of any suit duly prosecuted until abatement by death: *except* only in cases wherein the right, or claim, is declared to be absolute or indefeasible, i. e. except where the claim is liable to be defeated in *but one* way, namely, by proof of a consent or agreement by deed or writing. It is not clear, why the period of a tenancy for life is thus excluded; why, in fact, a person, "otherwise capable of resisting any claim," should be considered to be incapable, *because* he is a tenant for life. And, unless a case can be supposed, in which a man's being tenant for life would incapacitate him for prosecuting an action, to try the right to an easement, &c. the words "tenant for life," employed in this section, would seem to be inoperative.

The *eighth* section is expressly in favour of *reversioners* after tenancies for life, or for years exceeding three years from the granting of the term: but is applicable in the cases of *ways*, *water-courses* or the *use of water* only being claimed. In these cases, the time of enjoyment, during the continuance of the term, shall be excluded in the computation of the *forty* years (i. e. the period after which the claim is previously declared to be absolute, and indefeasible except in *one* way); *provided* the claim shall be resisted within three years next after the determination of the term, by any person entitled to a reversion expectant on the determination thereof. This exclusion, it will be observed, extends only to the computation of forty, and not of the *twenty*, years. It is apprehended, that, where twenty years only shall have elapsed, the claim, being liable to any method of defeat *but one*, will be rebutted by the reversioner's proving the existence of the term for life or years.

The act does not extend to Scotland or Ireland: and came into operation on the first day of last Michaelmas Term.<sup>1</sup>

W. A.

<sup>1</sup> See Sections 9 & 10.

## ART. VI.—AMERICAN PENITENTIARY SYSTEM.

*Du Système Pénitentiare aux Etats-unis, et de son Application en France : Suivi d'un Appendice sur les Colonies Pénales et de Notes Statistiques.* Par MM. G. de Beaumont et A. de Tocqueville, Avocats à la Cour Royale de Paris, Membres de la Société Historique de Pennsylvanie. Paris. 1833. 8vo.

WE read in ancient history of the journey of Lycurgus to Crete, in order to learn by actual observation the good laws which he proposed to transfer to his own country; and of the legislative mission of the Romans to Athens at the time of the enactment of the Laws of the Twelve Tables. In modern times, however, governments have usually been satisfied with obtaining information about the institutions of foreign states from the writers of the respective countries; although the notions derived from such sources are frequently false, as being distorted by party views, or imperfect, as being addressed to persons already in some measure acquainted with the subject. We cannot, therefore, but applaud the enlightened spirit which has led the French government to send scientific missions to various countries for the sake of collecting information on institutions which appeared susceptible of amendment in France. The results of these inquiries have, in several instances, been laid before the public, as in the works of Cottu on the English Judicial System, of Dupin on the trade and industry of England, and of Cousin on the National Education of Prussia and other German States; in addition to these, the book named at the head of this article contains a report by MM. de Beaumont and de Tocqueville on the Penitentiary System of the United States, founded on a personal inspection of all the principal penitentiaries in the Union, and a careful comparison of all the statistical data that could be procured on the spot. This report, which is drawn up with great perspicuity and a well chosen arrangement, contains the fullest account both of the history and nature of the American penitentiaries which exists; and wherever the

authors have had occasion to explain their own views, the opinions which they express appear to be characterized by a sound practical sense, equally removed from the indifference of those fatalist politicians who seem to think that crime cannot be prevented more than plagues or tempests, and from the unreflecting benevolence of those pious persons, who seek only to diminish the sufferings of convicts, without caring what mischief they thus inflict on the community. We esteem ourselves therefore fortunate in being able to give our readers a general view of the justly celebrated penitentiary system recently adopted in some of the United States, under the guidance of persons in whose accuracy and judgment we can place such well-grounded reliance.

The work of MM. de Beaumont and de Tocqueville is divided into three parts; of which the first contains a history of the origin and progress of the penitentiaries in the United States; an account of the nature of their different principles, the mode of their administration; and the means employed in them for preserving the necessary discipline; an examination of their effects in reforming convicts and preventing crimes; and a statement of their cost, as compared with that of the ancient prisons. The second part treats of the defects of the French prisons, and the applicability of the American system to France. The third part relates to *Houses of Refuge*, which are institutions partly of a penal and partly of a charitable nature, established in some of the United States, for the maintenance and education of children, either abandoned by their parents or likely on any grounds to fall into vicious habits. The authors likewise examine how far this system admits of imitation in France. An Appendix contains a discussion of the question of penal transportation, both on general grounds and as regards the actual circumstances of France, in which country this mode of punishment has become popular, just at the time that its impolicy appears to be generally admitted in this country. At the end are added numerous and detailed notes, not only on the statistics of crime in the United States and other countries, but also on pauperism, home colonies, and other subjects connected with the subject of legal punishments, though not strictly belonging to it. We propose now

to give such an account as our limits will permit of the principal contents of this work, with the exception of that part which relates to Houses of Refuge; a subject to which we hope to recur at some future period in treating the question of a *transition-punishment*, or a means of providing for discharged convicts; which is the principal difficulty connected with the penitentiary system, and a difficulty which penal transportation has been considered to have effectually removed; though the remedy is, in our opinion, far more pernicious than the evil which it has been supposed to relieve.<sup>1</sup>

The first attempt to improve the old prisons in the United States arose from the influence of the Quakers in Pennsylvania, and before the end of the last century the punishment of death had been in almost all cases abolished by the laws of that state, and solitary imprisonment without labour substituted in its place for all serious offences. But in the prison at Philadelphia, (called the Walnut Street Prison,) as well as in others built elsewhere on its model, the number of solitary cells was small, and reserved for the worst offenders, while the mass of the convicts associated together as in ordinary gaols. This system was found both expensive and ineffectual, it combined in fact the vices of both systems of imprisonments; inasmuch as there was unrestricted communication with its numerous train of evils for one part of the convicts, and solitary confinement without labour or instruction for the other part. The prison at Auburn was originally constructed on these vicious principles, as it consisted partly of cells, each of which was tenanted by *two* convicts, and partly of rooms, each containing from eight to twelve persons. The failure of this mixed system induced the legislature of New York to give a greater extension to the plan of solitary confinement, and in 1821 a new wing had been added to the Auburn prison, containing 81 solitary cells. But this experiment failed more signally than that which preceded it, inasmuch as the entire seclusion of the convict, without employment for the mind or body, was found to exceed the powers of human endurance. Five of the

<sup>1</sup> See some remarks on this subject in Law Magazine, vol. ix. p. 28.

number died in the first year; one became mad, another in a fit of despair attempted to kill himself.<sup>1</sup> Under these circumstances the system of complete seclusion was in 1823 abandoned at the Auburn penitentiary, twenty-five of the solitary convicts received a free pardon, and the rest were permitted to work with the other prisoners during the day-time. The managers of this prison, thus forced to abandon the mode of solitary confinement in its severest form, yet unwilling to forego the advantages which it manifestly possesses, hit upon a mode of making it tolerable, at the same time that they retained its most important benefits. This was done by confining each prisoner to his cell by night, and by making them work in company, but in silence, by day. A commission appointed in 1824 to inquire into the state of the Auburn Penitentiary, found this system already at work; it seems, however, like the world of Epicurus, to have been formed, as it were, by a fortuitous concourse of atoms, for notwithstanding the recentness of the event, it cannot be ascertained with whom the idea originated. The fact seems to be, that the materials were in a state ready for improvement; that *the pear*, to use Bonaparte's phrase, *was ripe*, and that somebody suggested as an expedient what was in fact a great and important invention—a solution of one of the most thorny problems in the science of legislation, and one which has foiled the most inventive and sagacious jurists. It appears however certain, that to Mr. Elam Lynds is due, if not the original conception of this plan, at least the earliest recognition of its value, and the perfection and exe-

<sup>1</sup> "La Fayette, when he was lately in the United States, and heard of the experiment of exclusive solitary confinement, said it was just a revival of the practice in the Bastille which had so dreadful an effect on the poor prisoners. "I repaired," he said, "to the scene on the second day of the demolition, and found that all the prisoners had been deranged by their solitary confinement, except one; he had been a prisoner 25 years, and was led forth during the height of the tumultuous riot of the people whilst engaged in tearing down the building. He looked around with amazement, for he had seen nobody in that space of time, (*i.e.* we suppose nobody except his gaolers,) and before night he was so much affected, that he became a confirmed maniac, from which situation he never recovered."—Stuart's *Three Years in North America*, vol. i. p. 91. When the state prison at Venice was opened by the French, there were found in it only a few persons, none of whom had been confined for a long time, except one old man, who died on the day after his liberation.

cution of the means by which it was to be put in practice. It was however soon found, that as this system required a cell for each convict, the Auburn Penitentiary, which contained only 550 cells, did not afford sufficient space; and accordingly in 1825 the construction of a new prison at Sing Sing was determined on. This penitentiary was built in the following extraordinary manner, (which, as the French authors justly remark, nothing but the strongest evidence could make credible): Mr. Elam Lynds, being director of the Auburn prison, "took with him 100 convicts accustomed to obey him, led them to the place where the intended prison was to be built, and there, encamped on the banks of the Hudson, without any asylum to receive him, without walls to enclose his dangerous companions, he set them to work, making of each a mason or a carpenter, and without any other means of enforcing obedience than the firmness of his character and the energy of his will. During several years the convicts, whose number was successively increased, worked in this manner in building their own prison; and the penitentiary of Sing Sing now contains 1000 cells, all constructed by the criminals who have been confined in them."—(p. 18.)

The state of Pennsylvania was at this time building a new penitentiary (at Cherry-hill), in addition to that at Pittsburgh, in which the system of absolute seclusion by day and night without labour had been adopted. The fame of the Auburn plan led to the appointment of a commission by the legislature of Pennsylvania, who (in 1827) reported in favour of the system followed in the penitentiaries of New York. This recommendation led to much discussion; and after many contradictory opinions had been advanced, the state of Pennsylvania ended by adopting a sort of compromise between the two methods, viz. *solitary confinement with labour*. On this system the penitentiary of Cherry-hill is administered. But this modification of the original plan was not considered by the other states as an improvement on it; and the Auburn system, having been imitated in 1825 by the state of Connecticut, was afterwards adopted by the legislatures of Massachusetts, Maryland, Tennessee, Kentucky, Maine, and Vermont. Into the other fifteen states the new method has not penetrated; and the old system still prevails, with its various

evils of confusion of crimes, ages, and sometimes even of sexes; of witnesses, of debtors, of prisoners committed for trial, and of convicts; large mortality, frequent escapes, idleness and unrestrained intercourse: in short, (as the authors say) "the assemblage of every form of vice and immorality." The United States thus contain the very best and the very worst prisons: a variety to which the nature of a federal union, combined with the various degrees of enlightenment, and the various interests of the several states, would naturally be expected to give rise. With these diversities, however, we are not concerned; our attention need only be directed to the penitentiaries conducted on that improved system which is only to be found in North America: for the evils of a vicious prison discipline we need not look beyond the limits of our own country.

Under oppressive governments, obnoxious or powerful persons have sometimes been buried alive in dark and secret dungeons, in order to prevent any communication with their friends, and so to preclude all chance of escape. But in the eyes of modern legislators, the chief object of *solitude*, as an engine of prison discipline, is to insure *silence*, for the sake of preventing amusement, corruption, oppression, and the various evils arising from the free communication of convicts.<sup>1</sup> The mischievous effects of the intercourse of prisoners, both as lightening their punishment and corrupting their morals, is now universally recognized in the United States; nor probably will they be denied by any European jurist. In order to effect a partial diminution of the evils of unrestrained communication, the American convicts were first divided into certain classes: but this system, though less bad than an absence of all classification, still left the great evils untouched: for the society even of a few persons is quite sufficient to take the sting out of any prison-life, and one vicious man will effectually prevent all moral reformation; as among convicts, the good do not improve the bad, but the bad corrupt the good. Classification having thus failed, complete solitude was resorted to. But after a fair trial of solitary imprisonment without occupation, the punishment was found too painful: it destroyed the health and produced premature death; it destroyed the mind, and

<sup>1</sup> See Law Mag. vol. ix. p. 19—24.



produced madness. In order therefore to bring this infliction within the limits of human endurance, the convicts have been allowed to work; and some literary, religious, and moral instruction has been afforded to them. By these means sufficient employment has been furnished both for the mind and body, to enable the convicts to endure the discipline of perpetual silence, except when broken by the voice of the teacher, and to be prohibited from all communication with each other and with their friends. Besides the proper and direct end of this system, which consists in making perpetual silence endurable, there are three other incidental advantages which it at the same time ensures. These are, 1st. *the love of work and habits of industry which it creates.* By no other means would it be possible to make convicts, for the most part accustomed to a life of idleness and enjoyment, look upon labour in any other light than as an irksome and painful task, which they would unwillingly begin, gladly leave off, and of which they would do as little as possible. But when a man is condemned to perpetual solitude or perpetual silence, labour, so far from being an annoyance, is a refuge and a relief from the overwhelming misery of complete isolation. Under such circumstances he is rather permitted to work as a favour than forced to work as a punishment: and thus he contracts a fondness for labour, as alone making his existence tolerable; and by his voluntary and unceasing application to it, acquires industrious habits, which no system of slave-labour could engender. All the convicts of the penitentiary at Philadelphia, whose statements are reported by the French commissioners, agree as to the comfort which they derive from working: one man states that "labour seems to him absolutely necessary to existence: that he would die without it." Another, being asked whether he is forced to work, answers that "labour is regarded there as a blessing. Sunday is the day in the week which seems the most endless, because labour is forbidden." Others say, that "they have only two pleasures—working, and reading their Bible." Another, who had been confined in the Walnut-street prison, stated "that there labour was a punishment which they endeavoured by every means to avoid, whereas in the penitentiary it was a great comfort." The same language is held by all the other convicts who are

questioned on the subject (p. 318—336): the resource which they find in working is indeed evidenced by the fact, that in the penitentiaries conducted on the new system, all the expenses are defrayed from the proceeds of the prisoner's labour, although this labour is voluntary and not compulsory.

2dly. *The instruction of the convicts and the habits of study and love of knowledge which they acquire.* The same motive that renders idle and dissolute persons fond of constant and severe labour, likewise makes ignorant and brutal persons eager to acquire or exercise the power of reading. On Sundays, when there is no labour, the literary instruction of the school-master and the religious exhortations of the chaplain, together with the reading of the Bible, are the only means by which the convicts can escape from the wearisome vacuity of speechless idleness. The convicts at the Philadelphia penitentiary all speak of "*labour and the Bible*" as being their only consolations; and it is to be observed, that those actions which are agreeable when they are done, are afterwards looked back to with pleasure, and repeated in the hope of their being again what they were found to be before. On the facilities of imparting instruction to the convicts, and the nature of that instruction, we shall speak presently when we come to the different modifications of the American penitentiary system; and we will here only remark that so far as the reformation of convicts is to be attained by any method of prison discipline, it may be expected from the double operation of the love of industry and of religious and moral instruction which the system in question cannot fail to produce.

3dly. *The saving of expense caused by the large amount of the proceeds of the convicts' labour.* It is obvious that under a system which affords the strongest stimulus to labour, a stimulus even stronger than the payment of wages, the produce of that labour must be more valuable than under a system which affords a weaker stimulus to labour than even the allowance to paupers from the parish rate. A more detailed account of the comparative expenses of the new penitentiaries and the common gaols will be given lower down.

The principle of silence accompanied with labour is common to the two kinds of improved penitentiaries established in the United States. But the means whereby it is enforced differ;

the Philadelphia system makes conversation physically impossible, by keeping the prisoners always confined in solitary cells; the New York or Auburn system permits the convicts to work, to learn and to eat in company, but uses the motive of fear to prevent conversation, by threatening the infliction of punishment if they break silence. The one takes away the power of communication; the other leaves the power, but furnishes a powerful motive not to use it. On the merits of these two systems much difference of opinion has existed in the United States. Mr. Livingston has urged that silence is absolutely incompatible with association, and that any attempt to prevent communication without perfect solitude is founded on mere delusion. This is a question which is to be decided by experience rather than by argument; and all the persons who have visited the state prison at Auburn and the other penitentiaries administered on the same principle agree in bearing witness to the perfect silence of the prisoners. The opinion of the natives, who have the best means of forming a judgment, is sufficiently proved by the fact that the system of labour in company has been adopted by seven other states besides New York, whereas the Philadelphia system has not yet found an imitator. The English travellers who have visited and described the Auburn prison, viz. Captain Basil Hall and Mr. Stuart,<sup>1</sup> bear witness to the same effect. The French Commissioners have the following remarks on this point:—

“Admitted, as we have been, into the interior of these different establishments, and going there at all hours of the day without being accompanied by any one, visiting by turns the cells, the workshops, the chapel, and the yards, we have never been able to discover a convict uttering a single word; and nevertheless we have sometimes devoted whole weeks to the observation of the same prison. At Auburn the arrangement of the building is singularly favourable to the discovery of all breaches of discipline. Each of the workshops in which the convicts labour, is surrounded by a gallery from which a spectator can see them without being seen. We have often, by means of that gallery, watched the conduct of the prisoners, but

<sup>1</sup> Mr. Stuart states, that “it is not an uncommon thing for a convict, when discharged, to state that he did not know the names of his fellow convicts, who had for months worked by his side and lodged in adjoining cells.”—Vol. i. p. 98.

never observed any infraction of the rules. There is, moreover, a fact which proves better than any other to what an extent silence is maintained by this discipline. At Sing Sing the convicts are employed in quarrying stone outside the penitentiary; so that 900 criminals, guarded by only 30 inspectors, work at liberty in the middle of the open country, without any chain on their hands or feet. It is plain that the lives of the inspectors would be at the mercy of the convicts, if they could exercise their physical power; but they want the moral power necessary for that purpose. Why are these 900 convicts together less strong than the 30 persons who command them? Because the inspectors communicate freely with each other, act in concert, and have all the power of association; while the convicts, separated from one another by silence, have, notwithstanding their numerical strength, all the weakness of isolation. Suppose that the convicts had the least opportunity of communication; in a moment all order is overthrown; the union of their understandings, produced by speech, has taught them the secret of their power; and their first infraction of the law of silence destroys the entire discipline. *The admirable order which prevails at Sing Sing, and which silence alone could maintain, proves therefore that silence is observed there.*"—p. 48—50.

These remarks, in our opinion, satisfactorily establish that silence can be successfully enforced without seclusion, and that communication may, with trifling exceptions, be prevented among persons who are in company. So far as the pain of the two systems is concerned, (which is by far the most important consideration,) there does not appear to be much difference; probably most convicts would, if they had the option, prefer working in company, though in silence, to perpetual confinement in the same cell, if it was merely to have the pleasure of locomotion and the sight of the human countenance. But the difference between the two methods in this respect is not great; and after having made some general remarks on the mode of governing the penitentiaries, we shall compare the two systems of *silence arising from inability to speak, and silence arising from the fear of punishment*, with reference to their tendency to reform and to their economy, on the assumption that in their most important attribute, viz. their power of inflicting pain, their merits are nearly balanced.

The management of the American penitentiaries, is entrusted to a superintendent, or warden, who is subject to the

general control of a board of inspectors, consisting generally of three persons. The inferior officers are under the power of the superintendent. The nomination of the superintendents is vested in high authorities of state, and the selection has hitherto been so successful, that for the most part they have been persons of very superior character. "We have been much struck (say the French Commissioners) with the importance attached to the choice of the persons who are to manage the new establishments. As soon as the penitentiary system appeared in the United States, the character of the persons employed underwent an immediate change. None but ordinary men were found to be gaolers of a *prison*: whereas the most distinguished persons present themselves for the sake of administering a *penitentiary*, where there is a moral impulse to be given." (p. 55.) Under the best contrived system of prison-discipline, so much must depend on the vigilance, the good sense, and the integrity of the chief officer, that it is difficult to over-estimate the importance of a proper choice of individuals, and an efficient superintendence by competent authorities.

When a convict arrives at a penitentiary, he is examined by a medical man, his hair is cut, and he receives the prison-dress. At Philadelphia, he is at once led to his cell, where he works, eats, and sleeps, and which he never quits during the term of his confinement. In the penitentiaries conducted on the Auburn system, after a few days solitary imprisonment, the convict is led out with the other prisoners, who under their respective keepers are marched out in a line into the yard, where they wash their hands and face, and are thence distributed into their respective work-shops. At Auburn, all the convicts assemble for their meals in the same hall: at Sing Sing and the other penitentiaries on the the same plan, they return to their several cells, and each eats his share in solitude. There appears to be (as the French authors remark) some risk in assembling so many convicts in the same spot; for although the vigilance of the keepers is doubtless much increased by the consciousness that they are treading on a mine which may at any moment explode, yet it seems unwise to incur any hazard which is not attended with obvious and considerable advantages.

“ At the close of day, the labours cease, and all the convicts return from the workshops to their cells. All the motions of the convicts during the day are carried on in the deepest silence, and nothing is heard in the prison but the sound of footsteps or the noise of working. But when the day is at an end, and the convicts have returned to their solitary cells, the silence which prevails within the circuit of these vast walls, where so many criminals are confined, is like the stillness of death. We have often during the night traversed those still galleries, glimmering with the light of a lamp; it seemed to us that we were passing through catacombs; there were around us a thousand living beings, and yet it was a solitude.” —p. 60.

In these penitentiaries it may be said emphatically that “ one day telleth another.” Every thing is uniform; all wear the same dress, rise at the same hour, labour at the same hours, eat the same food at the same hours, and return to their cells at the same hour. The diet is wholesome and plentiful, but coarse. Nothing in addition to the prison diet is allowed to the convicts, except in case of sickness. They receive no part of the produce of their labour, nor are they permitted to hold any communication with their friends either orally or by letter. All intercourse between the prisoners being interdicted, it is perhaps needless to say that gambling is strictly forbidden. As the stimulus of fear is sufficient for the maintenance of order, and the pain of silence and idleness is a sufficient incentive to labour, no rewards are given to the convicts for good conduct, nor do they receive any part of the proceeds of their industry. Both these regulations appear to us to be beneficial; it is an essential quality of a good punishment that no act of the convict, *subsequent to the commission of his crime*, should have any influence on his lot. It is important that society should know that a convict is suffering pain because he committed a certain offence, and that his sufferings will not be alleviated by any extraneous consideration. As to allowing the prisoners a part of their earnings, it seems to us desirable as much as possible to adopt the principle laid down by Mr. Livingston, that convicts are to be permitted to labour as an alleviation of their solitude, and that they are not to be considered as having any claim on the produce of their industry. The French Commissioners think that “ this system “ is of excessive severity,” and they ask “ what would be the

inconvenience of giving a slight stimulus to the zeal of the convict, a small recompense to his activity? Why should we not throw into his solitude, and in the middle of his sufferings, a pecuniary interest, which, however small it might be, would to him nevertheless be of immense value?"—(p. 70.) With respect to the severity of this system, this seems to us rather a recommendation than an objection; as the great difficulty in all secondary punishments is to ensure the infliction of pain. And as to the giving to the convicts a pecuniary interest in their labour, this would no doubt be desirable if there was not already a sufficiently strong motive; but as the desire of escaping from the inanition of solitude appears to be a stronger incentive to labour than even the hope of reward, we cannot see what good purpose would be gained by such a change. We undoubtedly think that some means should be afforded to the convict, on his discharge from prison, of supporting life without having recourse to crime; and so far as a gift of money can be conducive to this end, we approve of such an arrangement; but there does not appear any reason why this allowance should be proportional to the convict's gains in prison. Probably those persons who could work best, and would therefore have gained the most, would be the least in want of assistance; nor would there be any reason why a prisoner who had been confined for ten years should receive twice as large a sum as one who had been confined for only five years. The allowance made to convicts on their discharge should therefore, in our opinion, be independent of the amount of their gains when in confinement. This subject, however, belongs to the question of the treatment of discharged convicts, which we propose to discuss at some future period.

With regard to the labour of the convicts, the Auburn system is undoubtedly inferior to that of Philadelphia. Not only is it less costly to set men at work in the same room than to furnish each of them with tools and materials in a separate cell, but there are many kinds of labour which cannot be exercised by a single person in a narrow space. By joint efforts, refined and complicated manufactures can be executed, which have both the tendency of raising the convict's mind, and of giving him a greater power of gaining a livelihood after his discharge. Whereas a single workman, in his little



cell, must confine himself to coarser, simpler and less ingenious fabrics.<sup>1</sup> The instruction and inspection of a number are likewise easier than of separate individuals; and the more skilled and refined labour produces a greater profit to the prison. For these reasons the system of working in company must, so far as the labour of the convicts is concerned, be considered superior to that of working in solitude.

In all schemes of prison discipline the question arises—What shall be the punishment for persons in a state of punishment? What shall be the sanction of the rules which are to govern the conduct of a convict? In our penal colonies we have resolved this problem, by taking away nearly all semblance of hardship from the lot of a convict transported for crimes committed in the mother country, and by reserving the little pain which the system can inflict for convicts convicted of crimes committed in the colony.<sup>2</sup> The Philadelphia system has effectually solved this difficulty by disabling the convict from infringing the rules of the prison, and by substituting stone walls for an ulterior sanction.<sup>3</sup> But as the Auburn system puts the convicts in such a situation during the whole day that they may, if they will, commit a breach of discipline, it is necessary that there should be some means of obliging them by a painful motive to voluntary obedience. This motive has been found in the threat of the whip, which is employed in all the American penitentiaries as the punishment for breaches of discipline. It is considered preferable to all other means, because it produces the instant submission of the offender,

<sup>1</sup> The French Commissioners, however, state, that “the example of the penitentiary at Philadelphia, where all the convicts work, proves that the trades which can be exercised by single workmen are sufficiently numerous to enable them all to be usefully employed.”—p. 64.

<sup>2</sup> See this subject explained in *Law Mag.* vol. ix. p. 6—9.

<sup>3</sup> “Quelle contravention à l'ordre peut-on commettre dans la solitude? La discipline toute entière se trouve dans le fait de l'isolement, et dans l'impossibilité même où sont les prisonniers de violer la règle établie . . . . Il en est qui voient dans l'ordre établi à Philadelphie un système compliqué, qui s'organise difficilement et se maintient avec peine. Ceux qui pensent ainsi nous semblent commettre une grande erreur. Le système de Philadelphie est dispendieux, mais non difficile à établir; et une fois constitué, il se soutient de lui-même. C'est celui dont la discipline présente le moins d'embarras; chaque cellule est une prison dans la prison même, et les condamnés qui y sont détenus ne peuvent s'y rendre coupables de délits qui ne se commettent que dans l'association: il n'y a point de châtimens, parce qu'il n'y a point d'infraction.”—p. 74, 75.

because his labour is only interrupted for a few minutes, and the infliction is painful without being injurious to the health. The number of inflictions varies according to the circumstances of the several penitentiaries. At Sing Sing there are nearly five or six a day among 1000 convicts. At Auburn, having at first been frequent, they have become rare; one of the officers of that prison stated to the French Commissioners that "he remembered having seen at the beginning nineteen convicts flogged in less than an hour, but after the discipline had been well established, he had once been four months and a half without giving a single blow." In the penitentiary at Wethersfield, in Connecticut, corporal punishment is only resorted to as a last resource, after solitary confinement without labour, and in a dark cell, reduction of food, and other means have been tried in vain; but these means have proved so efficacious, that in the three years which preceded the Commissioners' visit, there had only been one case of flogging. "The directors of this establishment appear to have a decided aversion to corporal punishments; yet they attach great importance to the possession of the right of inflicting them. They seek to avoid the application of a cruel punishment; but they consider their power of enforcing it as a powerful means of action on the convicts."—(p. 77).

We confess that we are not sufficient humanitarians to care much for the *cruelty* of inflicting corporal punishment on convicts. As it seems to us, the only important considerations are, whether it is effectual, and whether it produces a bad effect on the minds of the sufferers? With regard to the first of these questions, the experience of the American penitentiaries is decisive; and under a vigilant inspection, detection would so certainly follow an offence, that the number of inflictions would probably not be numerous. For this reason we think that the effect of flogging, in brutalizing and hardening the convicts' minds, could not be considerable.<sup>1</sup> And

<sup>1</sup> If our memory does not deceive us, Mr. E. G. Wakefield stated, in his evidence before the Committee on Secondary Punishments, that flogging was a punishment only suited to boys, whereas men despised it before-hand, and were hardened by it after the infliction. His remarks, however, applied to flogging as a punishment for crimes committed at large, not as an engine of prison discipline. The number of

thus it would seem that this system affords the benefit arising from the fear of the whip, without producing the ill consequences which attend its frequent or severe use. Nevertheless it cannot be denied that so far as corporal punishment was actually employed, it would interfere with the reformatory discipline of the prison, as intended to raise and enlarge the minds of the convicts. The advantage, however, which the Philadelphia system possesses in this respect, is not of much moment; and with regard to the other more important elements of moral reformation, the Auburn system appears to have a decided superiority. The Sunday is the only day in the American penitentiaries which is not devoted to unintermitted labour from morning to night. Now as there only remain twelve hours in the week for the purposes of instruction, it is obviously desirable to make the best use of that short time. It is, however, evident that where literary instruction is to be given, much more can be done if several convicts are permitted to learn together than if each is to receive his lesson separately in his solitary cell. The same remark applies to the religious exhortations of the chaplain, and to the performance of the sacred offices, both of which would be much facilitated by the possibility of addressing the whole or a large part of the prisoners. It is true that the Philadelphia system, by its unvarying solitude, disposes the mind to religious meditation, and sometimes brings the convicts into a state resembling those repentant sinners whose thoughts have been raised to a holy enthusiasm by the effects of monastic seclusion. But we doubt whether this mixture of bitter remorse and religious aspiration is more likely to strengthen a convict's mind against the temptations which will surround him on his discharge from prison, than the moral lessons, of a less fervid but more solid character, which he would receive from the mouth of the chaplain. It is likewise to be observed, that the Philadelphia system, by making a breach of the rules physically impossible, dispenses with all moral discipline; whereas under the other method, the convicts, having it always in their power to offend, but abstaining

stripes inflicted in the American prisons appears to be small, and there is not the public exposure which produces the sense of ignominy so hurtful to the moral character.

from fear of punishment, acquire habits of self-restraint and self-government, which, whatever may be the motive, are not the less valuable *as habits*.<sup>1</sup>

But when we speak of the reformatory discipline of a penitentiary, we should first (as the French commissioners remark) inquire in what sense the reformation of criminals is practicable on a large scale, and as forming part of a system. If the reformation of a convict means that he is sent out of prison in such a state of mind that he fears punishment, has conquered his aversion to labour, has learnt a trade, and is able to occupy his idle hours without having recourse to drinking and debauchery, so that, if he can find employment, he is willing to get his livelihood by honest industry; then such a reformation seems to us not only possible, but may reasonably be expected from a well-regulated penitentiary system, accompanied with other judicious measures for the treatment of discharged convicts. Of 160 persons, respecting whose life after their discharge from Auburn information had been procured, 112 had conducted themselves well: the rest had returned to criminal or equivocal habits.<sup>2</sup> A discharged convict, examined by the

<sup>1</sup> The following extraordinary fact proves the force of habit in the convicts at Auburn; the French Commissioners mention it briefly from the report of the Auburn inspectors for 1829, (p. 79); we copy the following more detailed account from Mr. Stuart's recent Travels in North America:—"On the night of the 23d of October, 1828, an alarming fire broke out in a paint-shop in the prison connected with a wood-shed. The fire spread with great rapidity and very soon communicated with the windows of the building in which the convicts were locked up, and before any progress could be made in arresting it, the flames burnt through the windows and threatened the convicts in their night cells with suffocation. The keepers, at the hazard of their lives, rushed through fire and smoke and succeeded in unlocking every door, and discharged into the yard, at midnight, 550 convicts. Two avenues had now been opened to the street, through either of which the convicts might have escaped in the confusion of attending the carriage of water and the passing and re-passing of citizens. Instead, however, of attempting to escape, they formed the most efficient fire company, having extinguished the flames, and when this was done, were found in their places, no one having attempted to escape."—*Stuart's Three Years in North America*, vol. i. p. 100. The forbearance of the convicts to avail themselves of this opportunity doubtless arose from their want of confidence in one another, arising from the absence of intercourse, and from the impossibility of communicating with their friends at large on so sudden an emergency.

<sup>2</sup> This is the statement of the French Commissioners, p. 122. Mr. Stuart gives the same statement, vol. i. p. 98. We take no notice of the number of second convictions, for although the result is highly favourable to the new penitentiaries, the accounts seem to be of an uncertain nature.

Committee on Secondary Punishments, stated that out of the prisoners discharged from the English places of confinement, not one in fifty leads an honest life.<sup>1</sup> Nor is the system of transportation much more effectual in this respect, for we showed in a former number, by reference to official accounts, that of the transported convicts in New South Wales, more than a third part were suffering punishment for crimes committed *in the colony*.<sup>2</sup> It is obvious, therefore, that the American penitentiary system is far more likely than either imprisonment in company, or transportation, to change a convict into an useful member of society. But if by reformation is meant the *spiritual regeneration* of the convicts, "a death unto sin and a new birth unto righteousness," the infusion of high moral and religious principle, we are utterly incredulous as to the possibility of effecting such a change to any large extent. The following is an extract from a conversation between the Commissioners and Mr. Elam Lynds:—

"*Question.* Do you believe in the possibility of reforming a large number of convicts ?

"*Answer.* We must understand one another. I do not believe in their *complete* reformation, except for young offenders. Nothing, in my opinion, is more rare than to see a criminal of mature age become a religious and virtuous man. I have no faith in the sanctity of those who go out of prison ; and I do not believe that the advice of the chaplain, or the meditations of the convict, ever make him a good Christian. But my opinion is that a great number of old convicts do not commit fresh crimes, and that they even become useful citizens, having learnt a trade in prison, and having contracted there a constant habit of work. That is the only reformation which I ever hoped to produce, and I think it is the only one which society can demand."—p. 389.

Without going so far as to deny that the religious conversion of a convict may not occasionally be effected in the American penitentiaries, we fear that it is not to be expected as a probable effect of the system: when it does occur it must be considered not as a natural consequence, but as a happy accident. Strong religious impressions are certainly produced in solitude, as appears from the statements of the convicts in the Philadelphia Penitentiary; but it is to be feared that they may prove transient, and may cease with the cause which produced

<sup>1</sup> See Law Mag. vol. ix. p. 28, note.

<sup>2</sup> Ibid. p. 9, note.

them. At any rate, those persons who are sanguine as to the effects of religious instruction in prisons, should remember that the regimen of silence is indispensable to the success of their efforts. Five minutes of convict conversation would be sufficient to undo the effects of hours of good advice and pious exhortation. It is a remarkable fact that the American penitentiaries arose in great measure from an attempt to reform convicts; solitude and silence were resorted to, not because communication amuses prisoners and lightens the pain of confinement, but because the mutual instruction of convicts is the most powerful means of corruption. The inventors and perfectors of this system, therefore, stumbled on a precious principle without knowing in what its true value consisted. They prized it for the sake of a secondary and subordinate consequence; while they took less heed of an effect which it likewise produced, and which is in fact the paramount and legitimate object of the institution.<sup>1</sup> On this ground the name of *penitentiary* seems to us objectionable, inasmuch as it suggests the notion, not that convicts go there in order to suffer pain, as the consequence of the crimes for which they have been sentenced, but in order to repent them of their sins, and to learn to improve their moral conduct; which, however desirable so far as the persons themselves are concerned, obviously can have no effect on the remaining and more important part of the community.

As connected with the improved habits of the convicts, arising from their cleanliness, sobriety and orderly life, it may

<sup>1</sup> The French authors quote the following statement of Mr. Niles, a Commissioner of the Penitentiary of Maryland:—"From a closer and more intimate view of the subject, I have rather abandoned a hope I once entertained, of the general reformation of offenders through the penitentiary system. I now think that its chief good is the prevention of crime by the confinement of criminals."—p. 89. We wish that MM. de Beaumont and de Tocqueville had not, by an occasional incautiousness of expression, laid themselves open to the charge of mistaking the true end of a penitentiary system, viz. the determent from crime by inflicting pain on convicts. Thus they say, in page 81, "*Jusqu'à quel point l'usage des châtimens corporels peut-il se concilier avec l'objet même du système pénitentiaire, qui est la réforme du coupable ?*" So, in page 107, they state that "the advantages of the penitentiary system in the United States are, 1, the impossibility of corruption in the convicts when in prison; 2, great probability that by acquiring habits of obedience and labour, they may become useful citizens; and 3, the possibility of a radical reform." They doubtless meant to say, that in addition to the great and primary object, these were the incidental advantages of the system.

be proper to mention the very small mortality in the best American penitentiaries. At Sing Sing the annual mortality is 1 in 36; at Wethersfield, 1 in 44; at the Maryland Penitentiary, 1 in 48; at Auburn, 1 in 55; at the Massachusetts Penitentiary, 1 in 58. This is not only a less mortality than would doubtless take place among the same convicts if at large, as their dissolute lives would make them peculiarly liable to diseases; but is less than the average mortality of the districts in which the prisons are situated. See pp. 85. 393.

The comparative cheapness of the two systems may be considered under two heads—as respects the cost of building, and the income arising from the labour of the convicts. The French Commissioners remark, that “there are considerable expenses necessarily inherent in the Philadelphia system. As the convict is, according to this system, always confined, his cell must be spacious, well ventilated, provided with every thing that is required in a place which the inmate never quits, and large enough to enable him to work without much difficulty. This cell must moreover open upon a small yard, surrounded with walls, in which he may every day, at fixed hours, breathe the outward air. Now, whatever care may be taken to avoid expense in the construction of this cell and its appendages, it must necessarily be more costly than a cell of less size, without a separate yard, and only intended to be occupied by the convict during the night.”—p. 131. The following table will show the comparative cost of construction for the several new penitentiaries in the United States; it is, however, to be observed, that the expense of that at Philadelphia appears greater than its system would necessarily require, as a large outlay was made for the sake of architectural ornament. The same remark applies to that at Washington.

	Penitentiaries.	No. of Cells.	Expense of each Cell. <sup>1</sup>
Philadel. System.	Cherry Hill, near Philadelphia.....	262	1,648 doll. (338 <i>l.</i> 7 <i>s.</i> 8 <i>d.</i> )
	Pittsburg .....	190	978 doll. (203 <i>l.</i> 15 <i>s.</i> )
	Washington .....	160	1,125 doll. (234 <i>l.</i> 7 <i>s.</i> 4 <i>d.</i> )
Auburn System.	Charlestown near Boston.	300	286 doll. (59 <i>l.</i> 11 <i>s.</i> 8 <i>d.</i> )
	Sing Sing .....	1,000	200 doll. (41 <i>l.</i> 13 <i>s.</i> 4 <i>d.</i> )
	Wethersfield .....	232	150 doll. (31 <i>l.</i> 5 <i>s.</i> )
	Baltimore .....	320	146 doll. (30 <i>l.</i> 8 <i>s.</i> 4 <i>d.</i> )
	Blackwell Island .....	240	133 doll. (27 <i>l.</i> 14 <i>s.</i> 2 <i>d.</i> )

pp. 429—431.

<sup>1</sup> The expense of each cell is calculated by dividing the whole expense of the prison by the number of the cells. The dollar is reckoned at 4*s.* 2*d.*



Mr. Welles, one of the inspectors of the prison at Wethersfield, stated to the Commissioners his persuasion that a penitentiary of 500 cells might be built for 40,000 dollars (8,333*l.* 6*s.* 8*d.*), that is to say, for 80 dollars (16*l.* 13*s.* 4*d.*) a cell.—pp. 342—349. The probability is, that, if a proper locality was chosen, a penitentiary might be built at a less expense in England than in North America; for although the prices of the materials are generally higher in this country, the wages of labour are very much lower.—p. 293. It is to be observed, that much of the solidity of structure required in common gaols may be spared in a modern penitentiary; for as the convicts do not communicate with each other, they cannot act in common so as to effect an escape by force. Escapes from gaols are 'almost always effected by combined efforts, and with the assistance of others, even if only one convict should be willing to risk his life, or should succeed in breaking out. When Mr. Stuart visited Auburn in 1828, no escape had taken place from that prison.—vol. i. p. 88.

If the original expense of building is by this plan reduced to a minimum, the current expenses of the prison may be entirely defrayed from the produce of the convicts' labour. In 1831 the penitentiaries of Auburn and Wethersfield more than paid their own expenses; the penitentiary of Baltimore produced to the state of Maryland the net sum of 44,344 dollars (9,238*l.*) in the three first years of its institution. The Philadelphia prison, which is conducted on a less profitable system, has annually paid all its expenses, except the salaries of the officers.—pp. 429—436. Notwithstanding the different rates of wages in England and America, we see no reason to doubt that, under proper management, a penitentiary might in this country be made to pay the greater part of its own expenses; so that if the system could once be set a going, it would maintain itself with little assistance. It should however be borne in mind, that the saving of inconsiderable sums is in this question a matter of secondary moment; that it is extremely important to prevent the contractor from acquiring an undue influence over the officers, so as to interfere with the strictness of discipline, and that it is above all necessary to guard against the abuse of the prison becoming a mere manufactory.

On a general comparison of the two penitentiary systems—of working in solitude and working together in silence—it thus appears that the former is more expensive, both as respects the construction of the gaol and the gainfulness of the convicts' labour; that it teaches the convicts less profitable employments; that it affords less facilities for their literary and religious instruction, and exerts over them no moral discipline: but that it is attended with less risk, and inflicts rather more pain. Our opinion inclines to a preference of the Auburn system, even if the expenses were equal; but as both agree in admitting the same fundamental principle of perpetual silence made endurable by means of labour and instruction, it does not appear to us that a government could err in adopting either method.

The improved penitentiary system has not been established a sufficient number of years in the United States to enable us to form a well-grounded judgment on its effects. So far, however, as the number of second convictions can be ascertained, its success appears to be put out of doubt; thus in the old prison of New York the second convictions were 1 in 9; in the prison of Maryland 1 in 7; in Walnut Street prison and at Boston 1 in 6, and in the old prison of Connecticut 1 in 4.<sup>1</sup> But at Auburn the proportion is only 1 in 19, and at Wethersfield 1 in 20. It is however extremely difficult to ascertain the preventive effects of a penal system, as there are no means by common statistical accounts of discovering the number of crimes committed in a country. The number of commitments or of convictions is usually taken as an index; but a moment's reflection must show how imperfect a criterion it affords. For example, the exact number of murders annually committed in England is probably known, with very few exceptions; and probably detection and conviction of the murderers ensue in at least two-thirds of the cases. A nearly equal notoriety attends all the more serious crimes, such as burglary, highway robbery, arson, rape; and in some of these a large proportion of the offenders are brought to trial and convicted. But when we come to such crimes as obtaining

<sup>1</sup> It is ascertained, that, of 16,000 convicts in the central prisons of France, 4,000 have been convicted before: and the number of second convictions is increasing.—p. 148.

money on false pretences, swindling, and petty larceny, a large portion of the offences is not discovered even by the suffering party, and of those that are discovered a still larger part is not brought before the officers of justice, and consequently never obtains public notoriety. When anybody considers to what an extent pilfering prevails among the poorer classes; how many petty thefts are committed by servants and workmen in large establishments; how much fire-wood is stolen by cottagers in winter; how many pockets are emptied of their contents in large towns; and in general how many articles of small value are lost without the proprietor being either able to discover the offender, or if able, willing to take the necessary trouble for that purpose; if, we say, he considers these facts, he will probably be of opinion that not a hundredth part of the petty thefts committed in a country come under the cognizance of the courts. It is quite evident that thieving would be the most unprofitable of trades, if the assize calendars in England contained a list anything approaching to completeness of the crimes committed in six or eight months. It often happens that in a large county the whole value of the stolen property, as enumerated in the Calendar, would not much exceed 10*l.*, to be divided among thirty or forty persons: now it is clear that if this was to be taken as a fair sample of the profits of crime, the race of thieves would be soon extinguished by starvation, which would be a far more effectual way of *getting rid* of them than transportation to New South Wales. Mr. Wakefield states, in his book on the Punishment of Death, that the average career of a London thief may be taken at two years. As during the whole of this time, he maintains himself (and probably a mistress) in ease and luxury out of the property of others, it is plain that the one crime for which he is at last convicted furnishes a very imperfect guide to the number of others which he had committed without detection. In general, however, it may be said, that in the same country, at nearly the same state of civilization, for the same crime, and with the same system of police, the commitments or convictions bear a pretty constant ratio to the crimes. It is obvious, however, that the circumstances of different countries differ so much as to make all comparisons under this head fallacious; and in the same

country an improved police system might increase the commitments, while crime remained stationary, or had diminished: or a general alarm, which paralysed the executive power, and disorganized the system of society, might greatly diminish the commitments, while crime had largely increased. Of this latter case we have had two examples in our country within the last few years. In 1829 and 1830, when at certain periods of the year ricks were blazing every night, and the populations of whole parishes, and sometimes of whole districts, were engaged in violent attacks on the persons and properties of obnoxious individuals, when nearly the whole South of England was the scene of a poor-law insurrection, the returns of convictions certainly show an increased number of convictions for arson and riot; but no person by comparing them with former years could judge of the immense augmentation of those crimes at that unhappy period.<sup>1</sup> The state of Ireland during last autumn and winter affords even a stronger example. There a complete anarchy prevailed; men were murdered in the face of day, the police were powerless, witnesses dared not to give evidence, prosecutors dared not to prosecute, jurymen dared not to convict. Crimes the most savage and the most atrocious were multiplied a thousand-fold, while there were few commitments and no convictions. If at some future day nothing remained of the history of Ireland but the list of convictions, a person who took them as a test of the amount of crime would conclude that Ireland had never been in so prosperous, tranquil, and orderly a condition as at the end of 1832! Such are the errors into which an incautious use of this kind of argument is likely to lead.

We do not think it necessary to follow our authors through their remarks on the badness of the French prisons, (a fact sufficiently known to the readers of Vidocq's Memoirs,) or on the difficulties which attend the introduction of the American Penitentiary System into France. We believe that the chief obstacle to the establishment of improved penitentiaries in this country is the expense which would attend their construction: for we fear, that however willing Parliament might be to grant twenty millions in order to extinguish Negro

<sup>1</sup> In 1823 and 1824 the prosecutions for arson were twenty-eight in each year; in 1829, the prosecutions were thirty-seven; in 1830, forty-five.

slavery, it would not be so easy a matter to obtain half a million in order to put an end to the crying evil of penal colonies, and to purge the impurities of our hulks and gaols.

The commissioners conclude their work with a discussion of the merits of penal transportation, which is inconsistent with their recommendation of the adoption of a penitentiary system at home. Their opinion is, as may be expected from persons who have carefully and dispassionately examined the subject, unfavourable to this pernicious system; we do not, however, think it necessary to repeat their objections, after the full consideration which we have given to this question in former numbers of this Journal. (Nos. XV. and XIX.) We feel it, however, right to advert to a preliminary remark made by them on the advantages of transportation, to which, as being a concession from an enemy, the defenders of that punishment may doubtless attribute some weight.

“The system of transportation presents advantages, which we must begin by admitting. Of all punishments that of transportation is the only one which, without being cruel, nevertheless delivers the society from the presence of the convict. The criminal in prison may escape: when restored to liberty, at the expiration of his sentence, he becomes a just subject of alarm to all his neighbours: whereas the transported convict seldom reappears in his native country; with him is removed a fruitful germ of disorder and crime. This advantage is undoubtedly great; and it cannot fail to strike the minds of all in a country where the number of criminals is increasing, and where a whole nation of malefactors is already rising up. The system of transportation, therefore, rests on a truth, calculated by its simplicity to make its way among the multitude, who have not sufficient time to understand the real merits of any question. The state knows not what to do with criminals in their native country: therefore it exports them to another place.”—pp. 227, 228.

Now there is no doubt that transportation delivers one society from the presence of the convict, but it is only to inflict it on another; that the mother-country gains, but that she gains at the expense of the colony, whose welfare it is her duty to protect, and whose interests are bound up with her own. There is no doubt that with the convict is removed a fruitful germ of disorder and crime; but he is removed to a

place where he has more freedom of action, more facility of committing fresh crime, more chance of thriving in the world, of marrying some woman perhaps more depraved than himself, and raising up children to be a curse to the colony and a shame to the mother-country. It may be true that a whole nation of malefactors, composed chiefly of discharged convicts, is growing up in the heart of the country. But we would ask whether these persons are likely to do more harm as a despised, a shunned, and, as it were, an inferior caste, in the midst of an honest and an industrious population, than as forming a society by themselves, where they themselves set the law of opinion, where they are the most important as well as most numerous class, and where the government itself is forced to quail under their triumphant audacity? This *truth*, as the French commissioners are pleased to call the mischievous delusion to which we have adverted, may make its way among the unthinking multitude, but we trust that the number of persons who see the futility of the *riddance-principle*, as applied to transportation, may every day more and more increase. Most happily for France, whatever popular mania may exist on this subject, there are two reasons which make it next to impossible for her to have recourse to transportation; the one is, that she has no colony fit for the purpose, except she should choose to condemn Algiers to this sad office: the other is, that not being mistress of the seas, she could not ensure a communication with her colony during war.<sup>1</sup> For these reasons, we think, that those Frenchmen who are aware of the extreme perniciousness of penal transportation, need feel no alarm that it will (at least, for many years), be inflicted upon France: we only wish that we had equally good reasons why it could not be maintained in this country.<sup>2</sup>

L.

<sup>1</sup> We have reason to know, that a wish having been entertained some years ago by the Dutch government to establish a penal colony for Holland, the plan was abandoned on the ground of its being impracticable for a state which was not a first-rate naval power.

<sup>2</sup> "En 1832 le parlement britannique nomma une commission à l'effet d'examiner quels étaient les meilleurs moyens de rendre efficace l'application des peines autres que la peine de mort. La commission fit son rapport le 22 Juin, 1832. C'est dans ce précieux document que nous puisons les extraits qui suivent: nous devons dire cependant que la commission ne fut pas unanime, et que ses conclusions n'ex-

## ART. VII.—CHITTY'S PRACTICE OF THE LAW.

*The Practice of the Law in all its Departments; with a View of Rights, Injuries, and Remedies, as ameliorated by recent Statutes, Rules, and Decisions; showing the best modes of creating, perfecting, securing, and transferring Rights; and the best Remedies for every Injury, as well by acts of parties themselves as by legal proceedings; and either to prevent or remove Injuries, or to enforce specific relief or performance, or compensation; and showing the Practice in Arbitrations; before Justices; in Courts of Common Law, Equity, Ecclesiastical and Spiritual, Admiralty, and Courts of Appeal. With new Practical Forms. Intended as a Court and Circuit Companion.—In two Volumes. Vol. I. Parts I and II.—By JOSEPH CHITTY, Esq., of the Middle Temple, Barrister.—London: 1838.*

We have no doubt the profession in general will share with us the gratification we experience in finding, from the appearance of this work, that the learned and excellent author, although debarred by bodily infirmity from prosecuting any longer the more active labours of a forensic life, is still able to devote his talents and legal knowledge, even more usefully, because more undividedly, than before, to the benefit and instruction of his brethren. We briefly characterized this book in our last number as one which no legal practitioner ought to be without. A more minute and extended examination of it (the second part has since appeared) has amply confirmed that judgment. Valuable as are Mr. Chitty's former labours,

priment que les opinions de la majorité. C'est ce que nous a assuré un membre très-distingué du parlement britannique qui en faisait partie."—p. 244. On this passage we have two remarks to make. First, as members of opposite opinions are studiously put on select committees of the House of Commons, it rarely happens that their decisions are unanimous. Secondly, we beg to assure MM. de Beaumont and de Tocqueville, that whatever may be the opinion in France, in England the Report on Secondary Punishments is by no means considered a "*document précieux*."

We understand that a translation of the work of MM. de Beaumont and de Tocqueville is in preparation by Dr. Leiber, the learned editor of the *Encyclopedia Americana*, who will likewise furnish some original matter.



and highly as they are appreciated by the profession, we have no hesitation in expressing our conviction that the merits and usefulness of the present work will entitle him to claim from them a double debt of gratitude. The extent—we ought rather to say the universality—of its plan and character, may be gathered even from the title, which we have copied at its somewhat alarming length. A work professing to give a comprehensive view of all the rights incident to persons and property of every kind, and the modes of creating, perfecting, securing, and transferring them; of all the injuries, public and private, to which they can be subjected, and of all the lawful acts and remedies by which those injuries may and ought to be prevented, abated, redressed, and punished, without or by means of a resort to legal proceedings,—and pursuing all these subjects into minute practical detail,—involves an amount of labour which may well startle the languid students and patch-work compilers of the present day, and might appear formidable even to the laborious industry of a Comyns or a Viner.<sup>1</sup> In order, however, to enable our readers to judge more perfectly of its comprehensiveness and value, we proceed to a more detailed analysis of its contents.

The whole work is to be comprised in two volumes, of about a thousand pages each, of which the first only is yet published, and relates to matters antecedent to the commencement of any suit, while the second will state in detail all the practical modes of conducting, from first to last, every proceeding which can be termed litigation. The first volume is distributed into ten chapters. Chapter I. consists of a general introductory view of the properties, rules, and distinctions, incident to rights, injuries, and remedies of every kind; affording also *general* practical information for the selection of the best of several remedies. Chapter II. relates to rights affecting the *person*, whether absolute or relative, and the injuries and remedies applying to those rights. *Absolute* personal rights, with the injuries and remedies incident to them, are divided into those relating to *personal security*, *personal liberty*, and *sepulture*; the first of these subdivisions including all injuries to the life, the body or limbs, the health, and the reputation of the

<sup>1</sup> The “analytical table of rights, injuries, and remedies,” prefixed to the work, must of itself have cost considerable labour.

individual. *Relative* personal rights and injuries are distributed into those affecting the relations of husband and wife, parent and child, guardian and ward, master and apprentice, and master and servant.—Chapter III. details the law relating to the rights, injuries, and remedies incident to *personalty*; Chapter IV. to *real* property. In the former are considered, 1st, the nature and several kinds of *personalty*; 2d, the different extents of interest, 3d, the different times of enjoyment, which may exist in it; 4th, the number of owners by whom it may be enjoyed; 5th, the various modes of acquiring a right to it; 6th, the properties of all contracts relating to it; and lastly, the several injuries, offences, remedies, and punishments variously applicable to the various descriptions of *personalty*. The latter considers the rights to *realty* under the following heads:—1st, the nature and several kinds of *realty* in general, whether corporeal or incorporeal; 2d, tenures and their incidents; 3rd, the degrees of interest, the qualities and quantities of estates; 4th, the times of enjoyment, present or future; 5th, the divisions of ownership; 6th, the titles, or modes of acquiring or losing real estate (in which Blackstone's division is pretty closely followed;) 7th, the distinction between legal and equitable interests. And it divides the injuries and remedies applying to *realty* into *civil* and *criminal*, subdividing the former again into those relating to corporeal or incorporeal property. On all of these subjects the author has left little information to be desired, and has in fact brought together, in one shape or another, almost all that is to be found in the two first, and much of the other two, volumes of Blackstone, with the addition of the subsequent authorities, and of an almost infinite number of practical hints and directions which would be looked for in vain in the works of any other elementary writer.

In the chapters immediately succeeding, we come upon ground almost, if not altogether, untrodden by any former legal writer; the consideration, namely, of the various measures of *precaution* and *preparation* to which an individual may lawfully, and ought for his own protection, to have recourse for the prevention of apprehended or even possible injury; or after an injury has been begun, or an adverse right

has been advanced, for placing himself in the most secure position for the encounter of actual hostilities; and of the acts and remedies which he has a right to set in motion for the abatement or removal of injuries to his person or property—*without* or *before* a resort to legal proceedings. Chapter V. is entitled, “Of Precautionary Measures in Anticipation of an Injury.” It opens with some good advice to clients as to their selection of honest and competent legal advisers—which, however, we fear the legal advisers are more likely to read than they for whose information it is more immediately designed. After some observations on the necessity and prudence of precautionary measures in general, the author passes to the consideration of particular measures of precaution:—1st, in cases independent of any contract; 2dly, in cases where a contract exists. The former consist principally of various *notices* which it is advisable for a party to give—as notices not to give credit to persons for whose default he might otherwise be liable; notices of dissolution of partnership, of the loss or fraudulent obtaining of bills or notes, of danger in a particular place, notices not to trespass, &c. &c.; also of precautions in fixing boundaries and exercising acts of ownership over property, &c. The latter are considered under all the various relations in which parties may be placed in consequence of their contracts;—as precautions by *vendors and purchasers*, by *mortgagees*, by *landlord and tenant*, by *carriers*, by persons desirous of obtaining *liens* over property, &c. Under this head come also the performance of conditions precedent and concurrent; the various notices and requests necessary or advisable in order to the enforcing or rescinding a contract; the tendering of indemnity, &c. The author then considers the precautions to be observed by an expected defendant, as tender of debt, damages, or amends; securing a right of set-off, &c.:—informs his readers where it is essential to repeat the several precautionary measures before treated of, with a view of securing evidence of them:—and concludes with a statement of the precautions to be observed by (it should rather be said, of all the rights, duties and liabilities of) executors and administrators. Chapter VI. “Inception of an Injury, and Preliminary Steps before Actual Hostilities,” also divides the subject into measures unconnected and connected with contracts. Under the former head are

comprised demands of persons or goods, demands of explanation of assaults or slanders, notices to remove or discontinue nuisances, requests to remove goods from another's land, entry and demand of possession of land, and to avoid fines, and proceedings connected with claims upon the hundred. Under the latter—*notices and demands in general, demands of goods obtained by parties under an incapacity to contract, demands by landlords to create a forfeiture, notices of adverse proceedings to sureties, &c. &c.* Some of the matters discussed in these two chapters, although highly useful in themselves, are perhaps rather in the predicament of being dragged in head and shoulders; in truth, the author's anxiety to adhere to a systematic and philosophical arrangement has led him into some difficulties, which might have puzzled his readers but for the very full indexes subjoined to the volume. For instance, under the head of "*Precautions by Executors and Administrators,*" we find discussed not only the steps to be taken and rules to be observed by them in proving the will, getting in the assets, paying debts and legacies, &c. &c. but the whole course of proceedings, pleadings, and evidence in actions and suits by and against executors and administrators, certainly belonging, according to the author's plan, to a subsequent part of the work. Some of the recommendations and forms of notices, &c. given in this part of the volume, may excite a smile from the *naïveté* of their expression, or the quaintness of the terms in which they are couched. A notice not to trust a naughty wife "*should not unnecessarily calumniate the wife or any third party.*"—"How to effect that desirable object [of securing an admission out of the mouth of the opposite party] must depend on the circumstances of each particular case, and the character of the parties interested therein. It may justifiably be effected even by stratagem," &c. &c.—and then a note lets us into the "*innocent ruse*" of advertising that if a party apply at a place named he will hear of something to his advantage, and when he does apply, rewarding him with a subpoena. The following is the "*suggested form*" of notice of traps being set in private grounds—"Take notice that gins and traps and other instruments are set in these grounds to destroy *foxes* [*proh pudor!*] and vermin, and which if dogs are suffered to enter *it may be injurious to them.*"

Chapter VII. details the various lawful acts and remedies of parties, without resort to legal assistance, to prevent or put an end to injuries, or obtain satisfaction, or punish the offender. It is divided into, 1st, the consideration of preventive measures in general, and the proper means and circumstances of employing them; 2d, of the resistance and prevention of injuries to the person, to personal and to real property; 3d, the cases in which the interference of third parties is justifiable; 4th, of the apprehension of offenders; 5th, of resistance of process, escapes, prison-breaking, and pound-breach; 6th, of the rights of re-capture of persons or property; 7th, of the abatement and removal of nuisances and injuries, private and public; 8th, of distresses and seizures damage feasant for rent and for poor-rates; 9th and 10th, of set-off of debts and judgments; 11th, of remedies by retainer and lien:—although, as the author observes, these last are means of redress by mere operation of law, although without a resort to legal process.—Chapter VIII. proceeds to treat of the various modes of preventing injuries by *legal* authority—as by imprisonment of lunatics, by the personal interference or warrants of magistrates, by security to keep the peace, &c.; the modes of preventing and obtaining release from imprisonment, whether by habeas corpus or summary application; preventions by proceedings in the superior courts, wherein the subject of injunctions, in all the cases to which they can be applied, is fully considered—writs of *ne exeat regno*, bills to perpetuate testimony, bills to restrain actions, bills of interpleader, and motions before the courts of law; and, lastly, the author devotes a few sentences to the protesting of foreign bills for better security, (which belonged rather to the preceding chapter,) and to the proceedings by the custom of London against debtors *in meditatione fugæ*.

Chapter IX. consists of a full and well-digested statement of the law relating to the limitation of actions and suits by the several statutes of limitations, and the consequences of laches and lapse of time independently of the statutes; and in Chapter X. the various modes of obtaining *specific relief* and *performance*, whether at law by mandamus, or in equity by bill for specific performance or account, and as they are variously applicable to the rights of the person or of personal or real property, are discussed with equal minuteness.

Here the present volume closes. The second (which is to appear almost immediately after the end of the present session of parliament) supposing an injury to be complete, and the right of the injured party to proceedings for compensation or punishment not barred by lapse of time or his own act, will be devoted to the discussion, in the first place, of the retainers, rights and duties of professional agents of every class, and then to the details of every description of legal proceeding for redress, from its commencement to its conclusion. The author states his intention to adopt, in treating of the practice of the superior courts, the plan pursued in Crompton and Sellon's Practice, of stating in one principal column the full practice of the King's Bench, and showing in adjoining columns the difference, where there is any, in the practice of the other courts, subscribing in notes the clauses of statutes and rules by which the practice is governed, and the forms of proceedings; a plan certainly calculated to prevent a good deal of unnecessary repetition, and save the reader much trouble of reference.

Here then, as our readers will admit, a wide field of practical and valuable information is traversed, and, we can safely add, with a minute and patient accuracy, without which its very extent would have been an evil. Indeed we could vouch, from personal experience, for the surprising correctness with which the author, by the mere exercise of an extraordinary memory, is able to retrace a vast extent of legal lore. When the remaining volume of Mr. Chitty's Collection of Statutes shall be published, (and we are happy to hear that the difficulties which were in the way of its publication are not likely to impede it much longer,) the two works together will almost entirely supersede the necessity of any other books as companions for the circuit; while to the country practitioner, who is daily consulted as to the best means of escaping litigation or summarily remedying a grievance, the present work, which not only tells what the law is, but how an individual is to apply it best to his own case in all the numberless situations of actual or possible loss or injury to which he may be exposed, must prove a very valuable assistant, and that at a very reasonable cost.

## ART. VIII.—NEW POINTS OF ELECTION LAW.

1. *Cases of Controverted Elections, &c.* By Henry James Perry, Esq. M.A. and Jerome William Knapp, Esq. D.C.L. Part I. and Part II.
2. *Cases of Controverted Elections, &c.* By A. E. Cockburn, Esq. and W. Carpenter Rowe, Esq. Part I.

A QUESTION of great importance has arisen before the Election Committees, upon sections 59 and 60 of the Reform Act, as to the jurisdiction given or rather preserved to the House of Commons over the validity of votes tendered or admitted at the poll.

The two sections are in these words.

“Provided always, That any person whose name shall have been omitted from any register of voters *in consequence of the decision of the barrister*, who shall have revised the lists from which such register shall have been formed, may tender his vote at any election at which such register shall be in force, stating at the time the name or names of the candidate or candidates for whom he tenders such vote, and the returning officer or his deputy shall enter upon the poll book every vote so tendered, distinguishing the same from the votes admitted and allowed at such election.

“Provided also, That upon petition to the House of Commons, complaining of an undue election or return of any member or members to serve in Parliament, any petitioner, or any person defending such election or return, shall be at liberty to impeach the correctness of the register of voters in force at the time of such election, by proving that in consequence of the decision of the barrister who shall have revised the lists of voters from which such register shall have been formed, the name of any person who voted at such election was improperly inserted or retained in such register, or the name of any person who tendered his vote at such election improperly omitted from such register; and the select committee appointed for the trial of such petition shall alter the poll taken at such election according to the truth of the case, and shall report their determination thereupon to the House, and the House shall thereupon carry such determination into effect, and the return shall be amended, or the election declared void, as the case may be,



and the register corrected accordingly, or such other order shall be made as to the House shall seem proper."

The question argued before the Petersfield, Oxford and Bedford Committees, was whether the original jurisdiction of the House to inquire into the validity of all the votes tendered or admitted at the poll had been superseded by these sections, and limited, according to the terms thereof, to those votes upon the register which had been the objects of a decision by the revising barrister. On the one side it was contended that there were no express words taking away the entire jurisdiction formerly exercised by the House in this respect; on the other side, that were it intended to leave that jurisdiction entire, section 60, which empowers the select committees to scrutinize the register to a certain extent specified, would have been nugatory and unnecessary altogether, and that therefore the intention must have been to limit the jurisdiction to the cases which had undergone the decision of the revising barrister.

Mr. Harrison, in arguing for the former construction before the Oxford committee, gave the following history of the jurisdiction itself, abstracted from the preface to Glanville's Election Cases.

"In the preface to Glanville's cases, it is stated that many of the ablest members of the two last Parliaments of King James agreed in opinion 'that some certain rules or great outlines of the legal rights of voting were become necessary to be laid down, as a guide and direction to the electors and candidates in the country, and as a remembrance of the reasons and grounds upon which the determinations of the House were founded.' A select committee was accordingly formed, 'composed of a certain number of members, (60,) eminent for their great abilities, and particularly distinguished for their knowledge in the laws and constitution of their country.' Of this committee Sir Edward Coke, Sir Heneage Finch, afterwards Lord Keeper, Sir Robert Heath, then Solicitor-general, afterwards Lord Chief Justice, Sir Thomas Hatton, afterwards Chief Justice, Mr. Pym, Sir Thomas Trevor, afterwards Chief Justice of the Common Pleas, Mr. Glanville, Mr. Noy, and Mr. Selden, the celebrated antiquarian, were members. The cases in Glanville are the result of the labours

of that committee, and are therefore, of high authority. The preface proceeds thus: 'In the latter end of the sixteenth and the beginning of the seventeenth centuries, the question of the right to examine and determine matters relating to the election of members of Parliament was warmly agitated and contested between the Crown and the House of Commons. On the part of the Crown it was contended, that as the writ for election issued out of, and was returnable into, the Court of Chancery, the Lord Chancellor was the sole and proper judge of the due execution of the writ, and consequently of the legal qualifications of the elected. On the other hand, it was insisted upon by the House of Commons, that the sole and exclusive right of determining upon cases concerning the election of their own members was lodged in that House,' Before this it had been resolved by the House, 'that during *the time of sitting of this court*, there do not, at any time, any writ go out for the chusing or returning of any knight, citizen, burgess or baron, without the warrant of this House first directed for the same to the clerk of the Crown, *according to the ancient jurisdiction and authority of this House in that behalf accustomed and used.*' In 1586, the 28th and 29th of Queen Elizabeth, Mr. Farmer and Mr. Gresham were elected knights for the county of Norfolk. Before the meeting of the Parliament, upon a suggestion made in Chancery that the first writ was either not executed, or irregularly executed, another writ for the election of two knights for that county issued, by virtue of which Mr. Gresham and Mr. Heydon were returned as duly elected. On the meeting of the House, 'there appeared an intention in the House of taking the matter into consideration, and of inquiring into the merits of it.' 'The House of Commons received a very severe reprimand, in the Queen's name, for their presuming to interfere in it; notwithstanding which they persisted in their right,' and a committee was appointed to examine the circumstances of the said returns. The committee reported their opinion 'that the first writ and return were, in matter and form, perfect and duly executed.' They declared that they understood that the Lord Chancellor, and divers of the Judges, having examined the matter, were of the same opinion. The report further states, that it had been proposed by one of the committee, that two members of it might be sent to the Lord Chancellor, to understand what

his Lordship had done in the matter, 'which the residue thought not convenient; first, for that they were sufficiently satisfied therein by divers of themselves, but principally in respect they thought it very prejudicial and injurious to the privileges and liberties of this House to have the cause decided in any sort, by any others than only by such as are members of this House; and that albeit they thought very reverently (as becometh them) of the said Lord Chancellor and Judges, and know them to be competent judges in their places; yet in this case they took them not for judges in Parliament in this House. And so further required that, (if it were so thought good), Mr. Farmer and Mr. Gresham might take their oaths and be allowed of and received into this House, by force of the said writs, as so allowed and admitted only by the censure of this House, and not as allowed of by the said Lord Chancellor and Judges, which was agreed unto accordingly by the whole House, and so ordered also to be set down and entered by the clerk.'

"In 'The Form of Apology or satisfaction concerning their privileges, addressed to the King's most excellent majesty, from the House of Commons assembled in Parliament,' appears the following passage, with reference to the interference of the Crown in the case of the election of Sir Francis Goodwin: 'neither thought we that the judges' opinion, (which yet, in due place, we greatly reverence), being delivered with the common law, (which extends only to inferior and standing courts,) ought to bring any prejudice to this high Court of Parliament, *whose power being above the law, is not founded on the common laws, but have their rights and privileges peculiar unto themselves.*'

"In the year 1624, the House of Commons declare it to be 'the ancient and natural undoubted privilege and power of the Commons in Parliament, to examine the validity of elections and returns concerning their House and assembly, and to cause all undue returns in that behalf to be reformed, and to punish the offenders concerning the same according to justice.'

"On the 2d of February 1770, a resolution was moved in the House of Lords, 'that the House of Commons, in the exercise of its judicature in matters of election, is bound to judge according to the law of the land, and the known and established

laws and customs of Parliament, which is part thereof.' This motion was rejected, and it was resolved, " that any resolution of this House, directly or indirectly impeaching a judgement of the House of Commons, in a matter where their jurisdiction is competent, final and conclusive, would be a violation of the constitutional rights of the Commons, tends to make a breach between the two Houses of Parliament, and leads to general confusion,' thus ending by deciding in favour of the privileges of the House of Commons.

" The doctrines laid down by Glanville have been acted on without dispute ever since his time, and many subsequent statutes have been passed in confirmation of the jurisdiction, and of the ancient law and custom of Parliament. But if the argument on the other side is to be assented to, we must conclude that the authority of the Commons House of Parliament, which they would not in Elizabeth's time entrust to the Chancellor and the Judges, is to be placed by this act in the hands of junior barristers, of parish overseers, and country attornies."

It was not without good cause for jealousy that the House of Commons in the reigns of Elizabeth and James I. vindicated with so much firmness, against the power of the crown, the exclusive privilege of examining into the validity of the returns of its own members; nor was it without good reason that during a period antecedent to those reigns, the house had gradually assumed to itself that privilege which originally, according to Mr. Prynne,<sup>1</sup> was exercised solely by the crown. At this time of day, however, when the privileges of the house have but little to dread from the power of the crown, and after the construction of a complex and expensive machinery for ascertaining the validity of votes, it does appear to us that the House of Commons has little occasion to stickle for the jurisdiction of its committees in these matters. We question indeed very much the wisdom of allowing that appeal from the decision of the revising barrister to the select committees, which the Reform Act has directly given. The juridical character of the latter tribunal is at present very much changed for the worse, since the time when so many legal names of the highest eminence were to be found associated in maintaining the privileges of the house at a dangerous period of encroachment. In those days, and for a long time both previous and subsequent to the

<sup>1</sup> Brev. Parl. Part IV. p. 259, 260.

appointment of the celebrated committee of which Glanville was chairman, there were not various committees appointed to try various returns, but there was one select committee of returns and privileges for the whole session; from which circumstance, as well as from the high character of its members, that tribunal obtained for its decisions an undivided respect and authority, which certainly cannot be claimed for it at the present day. Great lawyers have now something else to do than to sit in grave judgment upon cases which might be equally well solved, for all purposes, by throwing up the smallest piece of the king's coinage, with this immense superiority, that the decision would then be one and incontrovertible; whereas so little are the decisions of one election committee binding upon another, that we sometimes find the same committee deciding in the teeth of its own previous judgment. With no fear of the Court of King's Bench before their eyes, the country gentlemen feel more at ease in an election committee than at quarter sessions, and riot in the uncontrolled privilege of misinterpretation at the expense of the contesting parties; while the Cokes, the Finches, the Noys and Seldens of the age, hurry about from committee-room to committee-room, hoping to be in time to convince committee in No. 12 of the exact reverse of the proposition they have just been laying down to Committee in No. 13. It is said that the decision of one committee during the present session was of such a nature that the gentlemen of the bar came to an agreement not even to cite it as a precedent on any future occasion. Under these circumstances there appears to be little reason for giving an appeal from the revising barrister to a select committee of the House of Commons; such cases should rather have been expressly taken out of that jurisdiction, whatever else were left to it; for besides that the time of members is unworthily occupied by the trial of such questions, (unless to be sure the object were to keep them out of mischief,) the decision of the barrister on a point of mere legal interpretation is more likely to be right than that of the superior tribunal, and this source of expense to candidates might well be spared. Inasmuch, however, as the expressions of the Reform Act are so ambiguous, and its provisions so incomplete, as to have given rise to contradictory decisions by the revising barristers in a great variety of cases, and as it is desirable that the various

rights of voting should be placed upon a notorious and established footing as soon as possible, some better mode of effecting this object should be thought of than that of referring such various decisions to the affirmance or disapprobation of different select committees; a course which if it did not tend to aggravate rather than diminish the uncertainty of the suffrage, would take an indefinite length of time to exhaust the ambiguities in question. Although many points of construction have already been submitted under the Reform Act, of which few can be considered finally settled, there remain a vast number in abeyance which have not yet been brought forward and which remain for succeeding committees to determine or perhaps embarrass. As in the great majority of these questions there is no more principle involved on one side of the question than the other, and all that is desired is the speedy ascertainment of the right of suffrage, the fitter course would probably be to make a new enactment explanatory of all the ambiguous or disputed points at present raised in practice under the act. This enactment, however, would probably be as lengthy as the original if complete, and possibly might give rise to new confusion. In the introduction to their Reports, Messrs. Perry and Knapp have given a catalogue of about thirty disputed points which have occurred to their own observation, scarcely any of which appear to have been raised at present before the committees; and we can from our own knowledge declare that catalogue to be by no means a complete one. Leaving the house itself to try the legality of returns questioned on other grounds, there is no reason why the validity of votes should not be left altogether to the judgment of the revising barrister; or if it were thought desirable to have some court of appeal, it would be better to supersede the functions of the select committees in this respect by creating some one single parliamentary tribunal to take cognizance of disputed votes alone, which might gradually construct a sound and substantial body of law, producing certainty by its decisions, and obtaining for them confidence and respect.

The unanimity of the Petersfield, Oxford and Bedford Committees, on the point of jurisdiction, is something quite wonderful in the annals of parliamentary jurisprudence; each having decided to confine itself to those votes upon the re-

gister or tendered at the poll, which had been the objects of a decision from the revising barrister. Some people presume to explain this unanimity in three committees by asserting that all are in the wrong. Certainly the arguments were very evenly balanced on each side of the question; but the intention of the legislature being clearly to limit the jurisdiction, though by no means sufficiently expressed, we rather think that so far the committees hit on the better construction of the two. We feel much more doubt, however, whether it was intended to leave the committee a jurisdiction over voters, who had become disqualified between the completion of the register and the taking of the poll; yet this appears to have been assumed by the Bedford Committee out of the very necessity of the thing, as persons disqualified in all manner of ways might otherwise be admitted to poll without restraint. The difficulty was pointed out by us in an article on the original Reform Bill in these words:

“Between the time of the completion of a register, and the time of polling, the space of a whole year may by possibility elapse; in every case this period will be several months, more or less as a dissolution of parliament may happen to take place. In this interval a person qualified to vote at the time of registration may become disqualified in many ways; he may have become a lunatic, a felon, or a peer; counsel, agent, or attorney to a candidate, poll-clerk, flagman, &c. &c., officer of customs, excise, or connected with the post-office, or otherwise unfit to vote. Under any of these circumstances it is clear that his vote cannot be rejected at the poll, because no question can be there asked him, or evidence given on any of these points; and hence the old enactments which preclude such improper persons from polling are *pro tanto* rendered nugatory.”

The third question allowed to be put by the returning officer at the poll, viz., “Have you the same qualification for which your name was originally inserted, &c.” It has also been repeatedly pointed out as too ambiguous to catch such defaulters, though probably intended to effect that purpose. The consequence of retaining such imperfect provisions has been to force upon the committee a jurisdiction of which they would have been better deprived, and the assumption of which is in fact



inconsistent with that limitation, which they have decided is imposed upon them by sections 59 and 60. If part of their jurisdiction has survived those sections, how can it be said that the whole has not? One remarkable consequence is, that the votes of persons so disqualified, although they may be rejected in committee, cannot be rejected at any previous stage of the proceedings; for if they answer the third question in the affirmative, as they may safely do, provided they retain the same occupation or property, the returning officer is bound to admit them to vote, without going farther into the fact of their disqualification. Such questions therefore are left solely cognizable by the select committee on petition, which must make all returns extremely uncertain where the numbers of the votes approach to an equality on both sides, and must tend greatly to increase the frequency of petitions.

Another decision of the Bedford Committee affecting the jurisdiction was, that committees have power to question the decision of the barrister on the informality of the notices. And again, where the notice of objection was informal, as not containing the objector's place of abode, they simply affirmed the barrister's judgment to that effect, and declined going into the merits of the vote. See Flight's case, Perry and Knapp, Part I. p. 116. The exact reverse of this was held by the Petersfield Committee, in Cookson's case, Perry and Knapp, Part I. p. 46, who seem to have decided either that the notice of objection was not invalid by reason of such omission, or that the committee had power notwithstanding to go into the merits of the vote. Looking at the words of the section, there can be no doubt that the Bedford Committee were right in both points; the notice of objection was informal, and therefore the voter's name could not have been "improperly retained on the register," which is the only circumstance giving them a right of interference. The same committee, however, in Lawson's case, Perry and Knapp, Part I. p. 137, ruled very inconsistently with the above decision, that "if the revising barrister decides upon a case, although the notice of objection was defective, a committee will entertain it." In that case the barrister retained the vote on the register, and the notice of objection being admitted to be bad before committee, the name could no more be said to have been "improperly retained on the re-

gister," which are the words of the act, than in Flight's case. Had the barrister omitted in this case the voter's name from the register, the committee would have had jurisdiction to allow the vote, the voter's name having been "improperly omitted from the register in consequence of the barrister's decision" on the validity of the notice, and they would have been bound to allow the vote in conformity with their own decision in Flight's case, and the words of the section. They determined, however, the vote to be bad, after an inquiry, which they had no more right to institute than the barrister in the court below. The same question arose before the Ripon Committee, in Snowden's case, Perry and Knapp, p. 204, who decided to the same effect as the Bedford in these terms:—

"That the committee, in their decision of yesterday, are not to be understood as admitting the validity of a notice of objection given without specification of the place of the abode of the objector; but inasmuch as the vote of George Snowden, notwithstanding this omission in the notice of objection, did actually become matter of discussion before the revising barrister, the committee are of opinion that this circumstance suffices to bring it within their jurisdiction, without determining whether the notice of objection on which the overseer or barrister acted was or not in perfect form and order."

It seems only necessary to set up against both these decisions the words of section 60, which prescribe the jurisdiction in these terms: "that upon petition to the House of Commons complaining of an undue election or return of any member or members to serve in parliament, any petitioner or any person defending such election or return shall be at liberty to impeach the correctness of the register of voters in force at the time of such election, by proving that, in consequence of the decision of the barrister who shall have revised the lists of voters from which such register shall have been formed, the name of any person who voted at such election was *improperly* inserted or retained in such register, or the name of any person who tendered his vote at such election *improperly* omitted from such register." The committees having founded upon this section their right to try the validity of the notices, the expression "improperly" must be taken to refer as much to that question, as to the merits of the vote itself.

In order to illustrate properly Thomas Chowne's case, also decided by the Bedford Committee, (Perry and Knapp, p. 141,) we must trouble the reader with another reference to Article VI. in No. XIII. of this Magazine. In a short dramatic sketch there given, by way of anticipation, of the proceedings of the barrister's court, which, so far as it went, has turned out completely prophetic, the following passage occurs:

*“ Par. Off.* Then, sir, there's Isaac Brown down as a free-man, but he's been dead this year and a half.

*Bar.* This is great neglect; when did you discover this mistake?

*Par. Off.* Oh! sir, almost directly after the list came out; but then you know, sir, we could not send *him* notice of objection.

*Bar.* Well, his name must stand, but I trust he will show better taste than to insist on his privilege of polling.”

It is true, that after the promulgation of the above prophecy, words were added to clause 42 of the Reform Act, empowering the barrister to “ expunge from the said lists the name of every person who shall be proved to him to be dead;” in the case, however, of one Thomas Chowne, a freeman registered in the register of Bedford Borough, who had been dead thirty-eight years, the revising barrister neglected to take this salutary precaution. Mark the awful consequences of trifling with the manes of a departed elector! On the second day of the poll, about two o'clock in the afternoon, to the inconceivable dismay and horror of all the by-standers, appears the said Thomas Chowne, a thirty-eight years' corpse, and in hollow and sepulchral tones, which send a chill into the hearts even of the winning candidates, asserts his privilege of being polled. The poll-clerk, with a trembling hand, records the dreadful syllables; the three questions which the returning officer may ask the voter at the poll, die away in faint and inefficient murmurs on his lips; and when the spectre, with its dry and dusty tongue, has named the names of Whitbread and Crawley, not a sound of applause nor a whisper of disapprobation escapes from the spell-bound and disheartened multitude. The friends of Captain Polhill, however, the beaten candidate, having taken heart upon a future day, resolve to question before a committee the propriety

of this Cock-lane proceeding. The committee enter into the merits of Thomas Chowne's vote, and are fully satisfied that the man registered has been dead thirty-eight years; an attempt is then made to establish the fact that the man who voted at the poll was not Thomas Chowne the spirit, but Thomas Chowne the nephew, of the departed freeman; in which case the vote would have been distinctly a bad one, see section 58; the committee, however, upon the whole facts, held the vote to be good, and must, therefore, be taken to have found the fact, that it was indeed the elder Thomas who appeared and voted at the poll. What a game old chap! We have no hesitation in saying this is the best authenticated ghost-story on record.

Clause 36, introduced into the Reform Act at the suggestion of Mr. Praed, to the effect that no person shall be entitled to be registered who shall, within twelve calendar months next previous to the 31st July in each year, have received parochial relief or other alms, which by the law of Parliament now disqualify from voting, has had the effect of enlarging the disqualifying period from twelve months (as it stood by the old law) to sixteen months at the least, and it may be to twenty-seven months or less, just as the time of election may happen to fall; for the Bedford Committee have decided that the receipt of alms between the time of registration and the time of polling disqualifies, in whatever shape given, by way of parochial employment, medical attendance, or otherwise. As parochial relief is gradually finding its way into very respectable classes of society, a good deal of disqualification will take place on these grounds in populous boroughs; but, as before observed, the voter so situated will pass muster at the poll, and therefore can only be thrown out on petition. A great number of persons of this description seem to have voted at Bedford last election; Mr. Harrison stated them at one-fifth of the whole poll: and as that place is said to swarm with paupers and charitable institutions, future candidates for the borough may lay their account for a petition on every election.

There seems to have existed some difference of opinion on the question, whether a vote can be impugned before the committee upon a ground which was not made the ground of objection before the revising barrister. In the case of William Fraser, before the Bedford Committee, (Cockburn and Rowe,

p. 99,) the vote was declared bad upon new grounds, and as it appears by the report, without argument on the point. Again, in Snowden's case before the Ripon Committee, Perry and Knapp, p. 204, the point was raised, and after a short argument it was held, that evidence of the new ground of objection should be received, and upon that evidence the vote was declared bad. On the contrary, in Burfoot's case, before the New Sarum Committee, Perry and Knapp, p. 258, the committee resolved "That before the counsel for the sitting member proceed to give evidence of circumstances to affect this vote, they must show on what grounds the barrister decided," and they peremptorily refused to hear any argument that such a course was unnecessary! This was rather a sturdy proceeding in the face of two decisions the other way, but we are by no means sure that the decision adopted by the one committee without hearing argument, was not better than that adopted by the other two upon deliberation; for to refer once more to the words of section 60, how can the barrister be said to have "*improperly* retained or inserted in the register" a vote which is bad upon grounds which were never brought before him? We humbly suggest, upon the strength of this instance, as well as upon the general presumption, that no harm at any rate would accrue from the recommendation, that counsel be excluded from the Committee-Rooms as well as from the Court of the Revising Barrister. Every one knows what an embarrassing thing it is to common sense to hear both sides of the question argued by dexterous logicians. In the case of John Brown's vote, for instance, the New Sarum Committee, after distinguishing themselves as above in Burfoot's case, seem to have been led astray by the eloquence of Serjeant Ludlow, who convinced them that being rated for a house is conclusive evidence of occupation by the person rated, in the face of facts which show the tenancy to have been in another person. The same Committee held the votes of William Morris and James Turner to have been improperly rejected by the returning officer at the poll, both having been described by wrong Christian names in the register. Perry and Knapp, p. 261. After this decision what claimant, fearing an objection, will trust the public with his real name? Under the auspices of the same Committee a new practice has been introduced, of examining the voter himself in support of his vote. This, though contrary to strict

usage, has some foundation in necessity, the barrister being empowered by 52d section to swear the claimant. The practice however seems limited at present to such facts as he proved or might have proved before the revising barrister.

In Crouch's case, Perry and Knapp, p. 229, the Southampton Committee decided, as the New Sarum Committee did in the cases of Morris and Turner, that although the voter is described by a wrong name in the register, it is competent to show that he was the person meant to be registered. The decision in Dawson's case, Perry and Knapp, p. 226, before the same Committee, went still further. In that case the voter's name had been altogether omitted by mistake from the register, and his tender at the poll was therefore rejected and not recorded by the returning officer. On proof of the tender from other testimony, the Committee went into the qualification and allowed the vote. The policy as well as propriety of both these decisions appears extremely questionable; as the Committee obviously assumes to itself the power of allowing a vote, which could not possibly be allowed at the poll, the evidence of the register being made by express terms of the act conclusive upon the returning officer. As the Select Committee is in the nature of a court of appeal from the barrister or returning officer, as the case may be, the course adopted is extremely anomalous, and must produce a great frequency of petitions against returns, as that will be the only mode of trying the validity of some particular votes.

We have now touched upon most of the points arising out of the provisions of the English Reform Act, which have come before those Committees, whose decisions are contained in the two parts of Messrs. Perry and Knapp's Reports at present published; of those published by Messrs. Cockburn and Rowe the first part alone has at present reached us. It will appear by the above remarks, that in the course of the trial of the petitions as yet reported, which are eight in number, under the English Reform Act, very little progress has been made in clearing up the difficulties and ambiguities with which the right of voting has been encumbered and embarrassed under the provisions of that Act. Scarcely any decisions appear to have occurred upon the rating clauses, or several other clauses of the Act, equally sure to be productive of litigation; and it may be said generally of the decisions given, that they have gone rather

to unsettle than to establish greater certainty upon the points disputed. Even upon the great question of jurisdiction, decided unanimously by the Oxford, Bedford, and Petersfield Committees, we find Mr. Harrison observing, in the Longford case, "that the authority of those cases is by no means such as to preclude the attempt to obtain their reversal; an attempt, the success of which would be hailed with satisfaction by some of the first lawyers of the country." Perry and Knapp, p. 185. What, we would ask, is the value or advantage of a court of appeal, whose judgments are liable to be treated with indifference and contempt like this, and the expense and uncertainty attending whose decisions are such as may easily drive the successful candidate from any attempt to maintain properly his return.

Our attention has been very little drawn to the operation of the Irish and Scotch Acts; we have been induced, however, to look into the former by the decision of the county of Longford Committee, "that they had the power to examine into the validity of all the votes standing upon the register;" which is exactly the reverse of what was decided on the jurisdiction by the three English Committees above-mentioned. The provisions, however, of the two Acts are very different. By the Irish Act, if the claimant of registration be rejected by the assistant barrister, an appeal is given him to the judge of assize; but if improperly admitted, there is no mode of appeal provided from that decision for a candidate or other person aggrieved thereby. Section 54, which makes the certificate or affidavit of registry conclusive of the right of voting, obviously applies only to the time of poll; and section 55 enacts, "that all laws, statutes and usages now in force, respecting elections of members to serve in parliament for any county, city, town or borough in Ireland, shall, save so far as they are respectively repealed or altered by this Act, remain, and they are hereby re-enacted and declared to be in full force." Again, section 59 enacts, "that if any person at the time of any election, being in the enjoyment of any office disqualifying him from voting at such election, or being otherwise disqualified, or having ceased to be qualified, shall, notwithstanding, have presumed to vote at such election, such person shall forfeit to his Majesty a sum of one hundred pounds, and shall be liable to all penalties, forfeitures and provisions to



which he would have been subject for such offence by any law now in force at the time of committing the same ; *and in case of a petition to the House of Commons for altering the return, or setting aside the election, at which such person shall have voted, his vote shall be struck off by the committee, with such costs as to them shall seem meet*, to be paid by him to the petitioner." It is quite apparent, that this is not such a specification of the jurisdiction of Committees as can be taken to have the effect of limiting and abridging the previous jurisdiction, as was held to be the effect of section 60 of the English Reform Act; and so far this passage of the Irish Act may be taken to be a comment on the intention entertained in framing the English one.

At the same time it is somewhat remarkable, that a power of appealing to the judge of assize from the assistant barrister's decision has been given to a rejected claimant of registration under the Irish Act; and it would operate rather harshly upon the latter, if, after a judge's decision in his favour, he were to be liable to have the question thrown open again, by a further appeal to a Committee, which is a plain consequence of the decision in the Longford case.

We rather wonder that no attempt has been made to cast upon our judges of assize the task of deciding the validity of disputed votes, where many votes depend upon one question. We have observed in a former article, that this might be effected in any such case, by bringing an action against the revising barrister for the penalty under section 76, for a wilful contravention of the act; as the point would be immediately raised for the judge's consideration, whether there had been any contravention of the act; if there were none, it would be a ground of nonsuit; if there were, it would go to the jury to say, whether it were wilful or no; which probably would never be found in any case; but a decision on the validity of the votes would be obtained far cheaper and better than by petition to the House of Commons.

We trust that so far as the validity of votes is concerned, no very long period will be suffered to elapse before some means are thought of and brought into effect, for superseding the jurisdiction, by way of appeal or otherwise, at present exercised by that expensive and unsatisfactory tribunal, a Select Committee.

ART. IX.—FIFTH REPORT OF THE COMMON LAW COMMISSIONERS.—LOCAL COURTS.

---

*Copy of the Fifth Report made to his Majesty by the Commissioners appointed to inquire into the Practice and Proceedings of the Superior Courts of Common Law. Presented pursuant to an Address, dated 2d May, 1833. Ordered by the House of Commons to be printed 3d May, 1833.*

THIS Report has greatly disappointed us. We expected to see the question completely set at rest by it, the inherent advantages of local and metropolitan systems of judicature fairly contrasted, and the preference conclusively awarded to one of them. The readers of this report will find nothing of the sort; the views are often narrow and the conclusions illogical; nor can much more be said for a large part of the evidence, which merely proves that law-suits are exceedingly dear. Now this is really proving nothing towards the argument, for as the alleged dearness is experienced full as much in the existing local as in the metropolitan courts, (Lord Brougham's butter case, in which £30 was expended in suing for 8s., took place in a county court,) the present state of things might just as fairly be urged against one system as the other. The truth of these remarks will sufficiently appear from the following short abstract of the Report.

"Our attention," say the Commissioners, after reciting their commission, "has been, in the first instance, directed to the question, to what extent the existing courts are adequate to the due administration of justice in respect of claims of small amount; and finding that they are in some essential respects inadequate to that purpose, we have, in the next place, proceeded to inquire in what manner the inconvenience which at present exists may best be remedied.

"In considering whether the present establishments are adequate to the exigencies of justice in cases of small amount, it seems proper first to advert to the inferior courts.

"It appears to us that the present inferior courts are more or less open to some or all of the following objections:—

“ That their jurisdiction is in general too limited in point of amount and local extent.

That frequently suits are removable into higher courts without security.

The want of competent judges and juries.

The want of efficient inferior ministers to serve and execute process.

The want of sufficient and simple process to compel an appearance.

The use of complicated and expensive pleadings.

The distance of the place of trial from the residences of the parties and witnesses.

The want of sufficient means to compel the attendance of witnesses.

Delay.

The facility of evading execution.

The abuses occasioned by entrusting the execution of process to improper agents, for whose misconduct no superior is responsible.

The want of appeal.

The expense of the proceedings as compared with the amount of the demand.”

The inferior courts are said to consist principally of—the county courts; the hundred or wapentake courts; courts baron; peculiar local courts of limited jurisdiction, which exist by prescription or grant, such as the palace court; the courts of particular boroughs; and courts established by many modern acts of parliament, comprising courts of requests.

The *County Court* is taken first. This species of court, as is well known, has fallen into general disuse in consequence of the numerous defects of the jurisdiction and the gross abuses prevailing in it. “ The limitation of jurisdiction in point of amount; the annual change of the officers who preside in these courts; the want of competent juries; the lengthened pleadings, heavy costs, unnecessary delay, and a vicious system of practice, attended with enormous abuse and oppression committed by bailiffs in the execution of process by improper agents, render these courts inefficient for the administration of justice, and the subject of general complaint.”

As the sittings of the county court, like the assizes, are generally held at one place, commonly the county town, suitors are necessarily subjected to the same expense in travelling and bringing up their witnesses. In illustration of this grievance, the Commissioners cite an instance of a Sussex man, residing fifty miles from Chichester, who paid a debt of 5s. rather than incur the expense and trouble of resisting the action. Do these gentlemen think it possible to establish any system of judicature, under which a person, consulting merely his own personal comfort, would not do precisely the same? Mixed up with the remarks on county courts, we find the following general remark:—

“ The evidence shows that many local courts possessing jurisdiction to an unlimited amount have fallen into utter decay in consequence of the want of competent judges. It appears, on the other hand, that where persons of competent skill have presided as judges, the jurisdiction has been highly beneficial to the public.”

This may be very true, but if you scatter and degrade the bar, where are persons of competent skill to be got? His Majesty's most particular attention is then requested to the county courts of Lancaster :

“ We humbly beg leave to call your Majesty's attention to the county court of Lancaster in particular, as presenting circumstances very important to the present inquiry.

“ The general powers and jurisdiction of this court are those ordinarily incident to all county courts; but by the 34th of King George the Third, c. 58, no cause can be removed by a defendant from this into a superior court, when the cause of action does not amount to £10, without giving security for the debt or damages and costs.

“ The effect of this provision is, that causes for demands under £10 are very seldom removed.”

A barrister acts as assessor; courts are held at Manchester as well as at Preston, where the ordinary business is discharged; and in many other respects efforts have been made to consult the convenience of the suitors. The court is consequently a good deal in request, so many as 9000 suits being annually commenced in it on the average. The costs, however, still

bear a large proportion to the amount of the debt recovered. The statement of this circumstance gives occasion for a highly important notification :

“ It may be here of importance, though at the expense of some digression, to remark, that in all legal proceedings the plaintiff ought to be allowed to recover from his adversary the full amount of costs which he has himself been compelled to expend. Every deduction for extra costs from the total amount recovered by a plaintiff is *pro tanto* a denial of justice. Theoretically the law gives him a remedy co-extensive with the debt due, but practically it is too often a remedy commensurate only with the residue left, after deducting expenses necessarily incurred in the prosecution of the suit, but not allowed on taxation.

“ Delay in legal proceedings is a still more grievous cause of complaint. It not only holds out to the debtor a temptation to resist, but exposes the creditor to a great risk of losing not merely the fruits of his judgment, but also the whole of the costs spent in obtaining the judgment. When the process of recovery is speedy, although the real costs allowed may exceed what was necessary, the mischief is alleviated by the consideration that the loss falls upon the party who was in the wrong. Still even the losing party ought not to be compelled to pay more than was necessary to the attainment of justice, especially in cases where his conduct in prosecuting or resisting the suit was not perverse, and the fear of heavy costs may prevent a party in narrow circumstances from suing for a just or resisting an unjust demand.”

Lord Brougham, it is to be observed, has incorporated this suggestion in his Bill, but nothing of the sort is yet proposed for the superior courts. Surely no fair comparison can be instituted whilst so striking a point of difference exists.

The vicious system of practice, particularly as regards mesne process, prevailing in County Courts, is exposed, and the evil resulting from the non-extension of the statute of jeofails to the inferior courts is dwelt upon. The want of sufficient means to compel the attendance of witnesses and to execute judgments in another county, are also mentioned as defects incident to all courts of limited jurisdiction.

The *Hundred Courts* and *Courts Baron*, which resemble

the County Courts in extent of jurisdiction (40s.) are said also to resemble them in their degeneracy. Incompetent juries, an ill-regulated course of pleading, and the practice of allowing costs wholly disproportioned to the cause of action, render these courts inoperative for any useful purpose; and, it is added, the jurisdiction of some of them has been increased by the legislature with very little advantage to the public. The Court Baron of the honour of Pontefract, and the Court of the manor of Wakefield, are referred to as instances.

The Palace Court is one of the very few courts of limited jurisdiction which has been attended with considerable success. We shall therefore give the sketch of it entire :

“The Palace Court has long been found to be a very useful and effectual court for the trial of causes below the amount of 20l.: its jurisdiction is unlimited in amount; yet as the cause when the damages are laid to the amount of 20l. may be removed into the superior courts at Westminster, without giving security for the costs, causes are usually removed in such cases into a superior court.

“The average number of causes brought in this court is about 6000 yearly.

“The average annual number tried is about 180.

“The amount of the plaintiff's costs, independently of witnesses where the cause is tried, is from 8l. to 10l.;

“Of the defendant's, from 6l. to 8l.

“The whole of such costs is allowed to the plaintiff on taxation, so that when he succeeds, he receives the net amount of the debt or damages, without any deduction for extra costs.

“The court is held in general once a week throughout the year.

“The average length of time intervening between the commencement of the suit and final judgment is about five weeks.

“The judge who presides is appointed by the crown, and for many years a barrister has officiated as deputy judge.

“The pleadings are such as are in use in the superior courts; but special pleas are not common, and demurrers are seldom if ever filed except for the purpose of delay.

“An estimate may be formed of the advantages which are felt to be derived from this court from the number of suits brought there, notwithstanding the facility which the metro-

polis affords for the trial of causes in the superior courts at Westminster. This may be confirmed from the fact, that plaintiffs, whose cause of action exceeds 20*l.*, frequently relinquish not only the right of suing in the superior courts, but also the right of arrest, for the sake of suing and retaining their causes in this court, and for this purpose sacrifice a part of their demand, laying their damages at a sum less than 20*l.* We have no hesitation in saying, that they are induced to make these sacrifices in consideration principally of the great advantages which they derive from the facility with which judgments and executions are obtained.

“The jurisdiction of this court, however, is limited to the distance of 12 miles, and no execution can be had against the person or property of any debtor beyond that limit.”

This statement appears to have been principally taken from the evidence of Mr. Benjamin Willoughby, a highly respectable attorney of the court, and Mr. George Long, who has often acted with high credit as its judge. These gentlemen, however, both agree that no general conclusions in favour of local courts can be founded on the success of the Palace Court. As the commissioners have thought proper to pass over this part of their examinations, we shall give an extract or two to this effect from each.

*Mr. Willoughby.* “How many attornies are there in the court? Six attornies, and four counsel.

“Could they do the business at that rate if it were open? I think not; an attorney with a few causes could not afford to practise in it. To make a cheap court for the public it must be confined to a limited number of practitioners. If the Palace Court should be thrown open, very few, and after a short time scarcely any attorney would practise in it, at least only the lowest of the profession. It never could be to the interest of an attorney to advise his client to sue in this court. It is the multiplicity of business which induces us to promote all the suits we can there. If I have only the same interest as the profession at large, it is not to be expected that I should select a court for practice in which the fees are obviously insufficient to compensate me for my labour and outlay of capital. It is in truth the suitors who derive the benefit of the court being confined to a limited number of practitioners: for unless it was so, they could not have their business conducted for the fees which they pay; and I do not see how the profession



generally could conduct the causes ; the proceedings are taken by answering the prothonotary's book in court, and it is impossible that an attorney could give his attendance weekly for that purpose, and be allowed no fee for so doing.

“ How do you account for the difference of expense between the Palace Court and the King's Bench ? A reference to the scale of costs which I have furnished will readily explain this ; the attorney's fees are considerably less. If there is special pleading, it is more simplified in practice, and less expensive.

“ Are the fees for pleas the same, whatever their length may be ? Yes ; I have just filed a special plea on the part of an executor of outstanding judgments. It necessarily consisted of several folios, and for that there is only the usual allowance of 12s. 10d., which includes a fee of 5s. paid to the counsel for signing it.

“ Are there sittings every week for interlocutory matters ? Yes ; all the proceedings are entered on paper, and every attorney is called upon in court before the judge to answer the case. The judge there disposes of all applications for time to plead, particulars of demand, oyer and copy of documents, and of all other interlocutory matters.

“ Are the pleas filed ? Yes ; all the pleadings are filed, and the parties, and indeed any person, may take copies of them.

“ Then it is optional whether they take copies ? Yes ; in special declarations we take copies, but not where the common counts are used.

“ Are the extra costs much ? There are no extra costs allowed in the court in any case.

“ Do you think that could be beneficially applied to the courts above ? I think it is impossible where cases of magnitude are to be tried in the court above. The causes in the Palace Court are generally of small amount between traders, and principally on questions of credit, or the value of goods sold, or of work done.

“ Have you any consultations before-hand ? The counsel of the court advise upon the pleadings without any fee : they have a certain fee upon every declaration carried in.

“ What is the amount of that fee ? Five shillings. Is that fee paid upon every declaration ? It is ; and without some such fee it would be utterly impossible that the counsel could be remunerated for devoting the whole of their time to the practice of the court. The fee of one guinea upon an issue brief can be no more considered as an adequate remuneration to the counsel for holding it, than 13s. 4d. is to the attorney for drawing it.

“ Do you conceive the Palace Court to be beneficial to the pub-

lic? I think it is useful in its present state of jurisdiction; I do not think it would be beneficial to open it generally to the profession: if it was opened, there would be little or no business done in it by reason of the smallness of the fees. Considering the limited practice we have, I think it a useful court for a particular class of debts, and having so many suits brought to one focus, we are enabled to conduct them for very small fees."

*Mr. Long.* "In your judgment would it be better to establish new local courts entirely or to improve upon the present county courts? I am not prepared to offer any decided opinion upon that subject. Whatever you do, I conceive there would be great difficulties with respect to local courts both as to the judge and as to the advocates.

"Is there any suggestion you can make as to those courts? I feel that it is a subject that requires much deeper consideration than I have been able to give to it. I take the Palace Court to be no sort of rule for those courts in the country, because in the Palace Court you have the advantage of the easy access of counsel, which you could not have in the country.

"Do not you think you would always have counsel in the country that would be sufficient for carrying on the business of a court? No; I should fear that you would not in many parts of the country.

"Are you aware that in very populous parts of the country, such as Liverpool and Manchester, there are a great many counsel locally resident? I should suppose that those large towns have all that is requisite to a local court, but I am not well acquainted with that part of the kingdom. Where there is business enough to induce a certain number of barristers to make their residence in a large town, I should conceive that would be a very great recommendation.

"Would you think it right that there should be counsel employed? You must have counsel or solicitors; I am not particular about which, if you can secure respectable men; but I have a great terror either of low counsel or low attornies. I mean low in point of morality, men who would make no scruple of plundering their clients for the sake of a profitable job. I fear local jurisdictions would be vineyards, which persons of that description would be apt to labour in. I presume no person of sense and experience would think of the parties being obliged to conduct their own causes."

The remarks of the Commissioners on Borough Courts are also sufficiently short to allow of our quoting them as they stand.

“ The courts of different boroughs, by grant or prescription, frequently possess jurisdiction to an unlimited amount, and several of these are stated to be of public convenience.

“ Their general utility is, however, much fettered by their local limits. It sometimes happens, as in the instance of the borough court of Liverpool, that the jurisdiction does not extend to wealthy and populous suburbs; and for want of officers competent to preside there, many of them have fallen into disuse.

“ It is represented to us, that the Lord Mayor’s Court and Sheriff’s Court, in the city of London, are less useful than they otherwise would be, in consequence of the practice being confined to a few privileged attornies.

“ It is a frequent subject of complaint, that the costs of borough courts are excessive, the plaintiff’s costs not unfrequently amounting to from 10*l.* to 14*l.* In the borough court of Newark the usual costs on a judgment by default are near 10*l.*, and in a suit to recover a debt to the amount of 2*l.* 11*s.*, the plaintiff’s taxed costs in that court have amounted to the sum of 13*l.* 16*s.* 6*d.*

“ The costs in the case of borough courts are, we believe, seldom regulated by any act of parliament or charter; the allowance of costs is usually arbitrary.

“ We may here observe, that if courts of baron and borough courts are to be allowed to possess concurrent jurisdiction with such local courts as may be newly established, any restrictions to which the latter may be subjected as to costs would be nugatory. It will always be to the interests of stewards and others to allow such costs as will secure a preference to their own courts.”

We are not quite sure that we understand the last general remark. It is not clear to us whether the preference in question is to be secured by allowing high costs to tempt the attornies, or low costs to tempt the suitors. If the former, the evil would soon cure itself, as the greater dearness of the borough courts would in that case soon become notorious; if the latter, we do not see that any harm could ensue. Moreover, the abolition of borough courts is likely to be warmly opposed by the inhabitants of the towns possessing them; and respectable authorities are not wanting to contend that

the borough courts present a cheaper and safer field of experiment than any new district courts that can be framed. Mr. Serjeant Talfourd, for one, seems to have a strong leaning in favour of this plan :

“ You say that you think the borough courts might be made sufficient for the purpose?—I think that they might at least be adapted to a safe experiment for the purpose of ascertaining the real wants and feelings of the county. Thus I think that the present difficulties in the way of the service of process might at once be done away by making the process serviceable in any place where the party can be found. Thus also the jurisdiction of the borough courts might be so extended as to embrace all the surrounding country; and the inhabitants or the corporation might have a power from their borough rates of paying a legal assessor, who might attend at such periods as necessity might require for the trial of such causes as might be thought by the parties more fit to be decided before him than before the other judges; and such assessor might either be the recorder of the borough, elected in the manner in which the recorder at present is elected, or he might be some other individual to be chosen by the inhabitants.

“ What would you do with large towns, which have no corporate establishment, such as Manchester, Sheffield and Leeds?—I would give them charters on their petition for them, or frame a general provision, by which they should be enabled to establish a court of the same description and on similar terms.

“ What provision do you think it would be right to make in such courts for the judge?—I would have some of the municipal authorities, whoever they may be, judges, with the opportunity of having the benefit of a legal assessor, in case the inhabitants should choose to pay the expense out of their rates.

“ Would you leave that to the option of the bailiff?—No, I would leave it to the option of the inhabitants.

“ Would you have a permanent or an occasional assessor?—I would have a permanent assessor.

“ A barrister?—A barrister.

“ Might not it be more expedient to pay him out of the fees of the Court than to impose a burthen upon the inhabitants?—I have myself a very strong objection to the system of paying by fees. One great evil, which I fear must attend on all establishments of local courts, is the probable distrust of the judges. I fear that the local feeling and local prejudice, which I have no doubt have been the great causes why local courts have fallen into decay, would still follow, though unquestionably in a less degree, the appointment

of a regular paid judge, who must reside either near or in the place at which he should sit to try."

The following distinction is important:

"Supposing such a system of borough courts, or courts in the nature of borough courts, to be established, would there be any material distinction between such a general system of local judicature and the other system which has been proposed?—There would be these two distinctions; in the first place, it would be optional upon the part of the inhabitants to have the jurisdiction established among them, and to pay the expense of an assessor; and in the next, it would be optional on the part of individuals suing, either to bring their actions there or in the superior courts."

It may be as well to mention that Mr. Serjeant Talfourd, as Deputy Recorder of Banbury, was recently applied to by the inhabitants to assist them in re-opening their borough court, and has drawn up a book of practice for their regulation. The only obstacle which has for some time prevented the carrying this design into effect, is the difficulty felt in ascertaining the fees to be allowed to the attornies who shall practise in the court. This is a difficulty which must invariably be felt in every attempt of the kind; yet Lord Brougham makes no immediate provision at all for the practice of his courts in ordinary, and was even angry with Lord Lyndhurst for suggesting that the schedule specifying the fees was a material portion of the Bill. We cannot quit Mr. Serjeant Talfourd's examination without calling attention to two or three other passages in it, which, whether right or wrong, are remarkable for a spirit and a power which very few legal contributions possess:

"If it be granted that a new system of local jurisdiction will give increased facility to the creditor, it does not follow that such facility will tend on the whole to the public good. Apart from this grand consideration, I apprehend a voluntary creditor can show no claim to a speedier remedy than he can now enforce; because he gave the credit with a full knowledge of the difficulty he had to encounter, and on a calculation of all chances of payment; and therefore I think, when you are contemplating a large prospective measure, that you must rest it on the ground of public benefit to be derived from the system of credit which you seek to encourage, and not on the hardship sustained by individual creditors, who have chosen to speculate on the honesty of their debtor, and on the difficulties and delays of the law. Now, I confess it seems to me, that setting aside

the operation of credit on great commercial transactions, which can have no relation to any scheme of local courts for the recovery of debts of 20*l.* or of 40*l.*, the disposition to give and to obtain credit, to which the power of personal arrest has afforded opportunity, is one of the great causes of moral debasement among us; that it has quickened the impulses of immediate gratification, and crushed the hopes of the future; that it has disturbed the course of steady industry, by petty ambition, to make a show of belonging to a rank a little beyond our own, or by vain attempts to reach it; that, for "plain living and high thinking" it has often substituted a life of pretension and of misery, and has produced that moral degradation inseparable from pecuniary difficulty and from the expedients and falsehoods to which it leads; and therefore it seems to me that the question which lies at the bottom of the claim which is advanced on behalf of the creditors to a speedier means of recovering their debt, is this—is it desirable that new encouragement should be given to credit in cases which, from their nature and amount, have no relation to an extended commercial policy?

"Then do you think it would not be a mischievous thing to have a law directing that nobody should sue for a debt under 20*l.*?—I do not think that this inference of necessity follows from what I have ventured to suggest, because I apprehend that there is much to be considered in the situation of a man who becomes a party in a cause, besides the mere amount of the verdict which he seeks. I do not think we estimate litigation as a part of human affairs correctly, if we merely balance the sum which is recovered against the amount of costs which is incurred, because there is a great deal in the experience attendant on the relation of litigants in a court of justice, even in causes devoid of all interest to the by-standers, besides the mere amount of the nominal stake for which they contend. There is much of pleasure and of pride, a vent for animosities which might tend to darker issues; busy hopes and fears stirring the dull course of mechanical life, and a sense of importance not even without a moral value. For a man in humble station to have a cause at the assizes; to see a judge engaged in the patient investigation of his affairs; to have counsel of his own zealous in his cause; and to live in the county newspaper one week more, has matter in it more vital than the money. He is for the time the centre of a small but animated circle of partisans; and is this nothing? Nor when the cost of the witnesses is summed up, must the enjoyment it purchases for them be entirely forgotten. There is more then to be considered in a cause than the amount of damages; its costs are not lost as if thrown into the sea, but expend-

ed in a great degree in the production of interest and pleasure, and therefore looking to its influence on the sum of human happiness, it does not follow that because the expense and hazard are out of proportion to its palpable result, the expenditure is unmingled evil."

Scott, who knew something of human nature, must have had this feeling in his mind when he makes Playdell talk of giving Dandie Dinmont "the luxury of a lawsuit at the least possible expense," and makes Dandie reply: "A man's aye the better thought of in our country for having been afore the feifteen;" but he has given, in another character, an ample answer to the inference:

" 'Celebrity? Ye may swear that,' said Peter Peebles, 'And I dinna wonder that folk that judge things by their outward grandeur, should think me something worth their envying. It's very true that it is grandeur upon earth to hear ane's name thunnered out along the long-arched roof of the Outer-House.—' Poor Peter Peebles against Plainstones, *et per contrā*;' a' the best lawyers in the house fleeing like eagles to the prey; some because they are in the cause, and some because they want to be thought engaged (for there are tricks in other trades by selling muslins,)—to see the reporters mending their pens to take down the debate—the Lords themselves pooin' in their chairs, like folk sitting down to a gude dinner, and crying on the clerks for parts and pendicles of the process, who, puir bodies, can do little mair than cry on their closet-keepers to help them. To see a' this,' continued Peter, in a tone of sustained rapture, 'and to ken that naething will be said or dune amang a' thae grand folk, for maybe the feck of three hours, saving what concerns you and your business—O, man, nae wonder that ye judge this to be earthly glory!—*And yet, neighbour, as I was saying, there be unco drawbacks—I whiles think of my bit house, where dinner, and supper, and breakfast, used to come without the crying for, just as if fairies had brought it,—and the gude bed at e'en,—and the needfu' penny in the pouch. And then to see a' ane's worldly substance capering in the air in a pair of weigh-bauks, now up, now down, as the breath of judge or counsel inclines it for pursuer or defender—troth, man, there are times I rue having ever begun the plea wark, though, maybe, when ye consider the renown and credit I have by it, ye will hardly believe what I am saying.*'"—*Redgauntlet*, vol. ii. p. 352, 353.

Mr. Serjeant Talfourd knows too well how much thought and feeling Scott constantly places in the mouths of the meanest characters who figure in his Tales, to suppose that we are



slighting the argument which we seek to qualify upon Peter Peebles' authority.

*Courts of Requests* are the last courts of petty jurisdiction reviewed. We find the following observations relating to them:—

“ We now beg leave to advert to the numerous courts which, under the description of Courts of Requests or Courts of Conscience, have from time to time been yielded to the importunities of different classes of persons in populous districts.

“ All these have arisen from a necessity for a more cheap and speedy method of enforcing small claims.

“ The suspicion entertained, however, by Sir William Blackstone as to the policy of erecting courts, ‘ with methods of proceeding entirely in derogation of the common law, and whose large discretionary powers make a petty tyranny in a set of standing Commissioners,’ have not been removed by later experience.

“ It is a matter of sound moral as well as just legal policy that no debtor shall be exempted from the legal obligation to pay a just debt, however small; such an exemption would not only be unjust in reference to the poorer classes of society, to whom small sums may be of great importance, but objectionable in its tendency to weaken the sense of moral obligation.

“ On the other hand, the due administration of justice in the case of very minute claims is subject to inconvenience. The labour and difficulty of investigation do not depend on the magnitude of the cause of action, and it is possible that twelve jurors may be occupied for a whole day in deciding upon the justice of a claim of 12*d.*, and at a far greater expense and inconvenience to each of them than ten times the whole amount of the debt and costs.

“ If justice in such cases is to be administered according to the ordinary rules of evidence, in a court regulated by certain rules of practice, the proceeding ceases to be remedial in its effect. If, on the other hand, all such restraints be dispensed with, the tribunal becomes arbitrary, and its decisions too vague and uncertain to be satisfactory.

“ Where the cause of suit is too minute to bear the ex-

penses, which, however moderate, are necessarily incident to proceedings conducted according to any certain and methodical rules binding on those who administer justice, the confidence reposed must be altogether of a personal nature, depending on the known ability and integrity of the judge.

“ These considerations tend to point out the main objection to which a Court of Requests is, in its nature, subject. So much is left to the discretion of those who decide the cause, that they ought to be persons of considerable ability and learning to perform their functions with propriety. But they consist, in general, of commissioners, whose pursuits in life can give no assurance of their possessing these qualities.

“ There is a suspicion, too, (whether well or ill founded it is difficult to determine,) that their decisions are often wanting in impartiality.

“ We may observe that the facility of obtaining execution against the goods and even the person of the debtor, in Courts of Request, has been represented to us as injurious, by encouraging the giving of credit, and the incurring of debts to a mischievous extent, and that whilst the labourer is obtaining credit for necessities at an enhanced price, he is enabled to waste his ready money in procuring indulgences which he cannot obtain on credit.”

The occasionally harsh exercise of the power of imprisonment vested in those courts is also dwelt upon. Instances, it is said, have occurred of the imprisonment of defendants for several weeks, in respect of debts to the amount of 1*s.* 6*d.* or 2*s.*; and the certain effect of the practice of imprisonment in such cases is irreparable injury to the habits, feelings, and morals of the lower classes of society. On this head, therefore, the Commissioners are directly opposed to Lord Brougham, who proposes that all existing Courts of Requests should be retained.<sup>1</sup>

The general conclusion drawn from this review of the existing inferior courts is the following:—

“ We think that the existence of so many different courts of concurrent jurisdiction, founded on principles and adopting

<sup>1</sup> It is a singular example of the prevailing ignorance as to Lord Brougham's Bill, that, in the *Standard Newspaper* of June 20th, the proposed new courts were described as substantially resembling Courts of Requests.

modes of procedure so widely different, is an evil which requires a remedy. The difference in the modes of procedure is so striking as to render it impossible that all should be consistent with sound policy, and conducive to justice."

The Commissioners then briefly trace the history of the superior courts, and state the ordinary objections to them:—

"The superior courts are inadequate to the effectual administration of justice, when the cause of action is not considerable,—

"First, on account of the delay.

"Secondly, the expense of the suit as compared with the value of the subject-matter in dispute.

"Thirdly, the practice of the superior courts to refuse new trials where the cause of action is less than £20.

"The mischief arising from delay is particularly felt in the great commercial districts at a distance from the metropolis. Where a cause of action arises previously to the summer assizes, but not at such an interval as to admit of the cause being tried at those assizes, a defendant is often able at a small expense to set his creditors at defiance for nine or ten months; the plaintiff cannot go to trial till the next spring assizes, nor obtain execution in the ordinary course before the following April. In other cases, the delay may amount to nine, eight, or seven months; and it may be stated, that on the average, judgment cannot be obtained through the medium of a trial at the assizes in less than six months.

"The average expense incurred by a plaintiff in prosecuting a suit to judgment and execution cannot be estimated at less than £30; that of the defendant at not less than £20; independently of the costs of conveying and maintaining witnesses, which in a country cause constitute, with the expense of passing the record and of entering the cause for trial, the most considerable part of the costs. These are the more serious where the place where the assizes are held is situated at a considerable distance from the populous parts of the county. When a witness from Manchester or Liverpool is taken to the assizes at Lancaster, the costs of conveyance and maintenance do not average less than from £7 to £8; it therefore frequently happens that the costs of a plaintiff, when three or four witnesses are necessary to make out his case, amount

to at least £50 or £60, but often, we believe, to a much larger sum."

They have here fallen into the very common-place, and in them most reprehensible, fallacy, of founding conclusions against the metropolitan system of judicature on its present condition, without making any allowance for its capabilities of improvement. As well, as has been already intimated, might we argue against the principle of the local systems, because the existing local courts are confessedly inadequate.

It seems unnecessary to follow the Commissioners through the rest of the considerations which induce them to condemn the present administration of justice, which indeed are all necessarily resolvable into the alleged delays and expenses attendant on it. They decide with equal confidence as to the means of remedy. "These," say they, "must consist either in alterations made in the superior or inferior courts which now exist, or in the establishment of new local courts."

"It appears to us that no adequate alteration can be made in the superior courts,

"The machinery adapted to the ends of judicial investigation in causes of great complexity and large amount, must necessarily be too costly for the trial of causes of small amount and little complexity.

"It would be very difficult, with the present number of judges, that assizes for the trial of causes in the country should be held more than twice a year; it would be impossible that they should be held so frequently as to remove the objections on the ground of delay, or at so many places as to obviate the present objections on the score of expense and inconvenience. Where all the causes which have arisen within a period of five or six months, in an extensive and populous commercial district, are brought to trial at the same place, their number renders the time of trial uncertain, and great expenses are incurred in the conveyance and maintenance of jurors, parties and witnesses, at a distance from their homes.

"These are frequently withdrawn from the superintendence of their affairs, and detained at a distance from their residences and places of business, at a risk and inconvenience which scarcely admits of any pecuniary estimate.

"With respect to the inferior courts, at present established,

we think their defects so numerous and complicated, that it is easier to devise new institutions than to introduce effectual improvements in those which exist."

After stating a few rather fanciful analogies which have induced them to fix on £20 as the maximum, they proceed to state their reasons for not giving a wider jurisdiction at first:—

"We beg leave, however, to remark, that in recommending £20 as the limit to the jurisdiction of the local court in point of amount, we do not conceive that the establishment of such a jurisdiction would afford a remedy by any means commensurate with the evil arising from the defects to which we have already alluded; and in order to avoid any misconception on this head, we think it right to state our reasons for not recommending at present a more extensive jurisdiction in conformity with the numerous suggestions contained in the evidence.

"In the first place, as some, whose opinions we greatly respect, doubt of the expediency of any considerable extension of local jurisdiction, we think that it may be more satisfactory that the change should be gradual and experimental, rather than that it should be immediate and final; the more especially as any increase of jurisdiction may be at any time effected without occasioning the necessity for any considerable alterations in the structure of the courts.

*"Another and stronger reason is, that the extent to which the jurisdiction of the inferior courts ought to be carried must depend much on the question how far the delay and expense attending suits in the superior courts are capable of reduction, which has not yet been sufficiently ascertained.*

"We conceive that the expense of suits in the superior courts, and consequently the necessity for extending the jurisdiction of the local courts, may be greatly diminished by reducing the fees payable for the passing of records, and the entering of causes for trial, and other office fees, and diminishing the expenses of witnesses by holding the assizes at more convenient places than is now done. *By curtailing these expenses, and by other means alluded to in former reports, the costs of a cause would, in a majority of cases, be reduced to at least one half of their present amount.*"

These reasons appear to us to be quite sufficient for postponing the establishment of local courts for the present.

Besides the jurisdiction abovementioned, it is proposed to give the local courts power to try issues in cases where the debt does not exceed £60, provided the plaintiff shall have made affidavit of the amount really due, and the defendant does not either give security for the debt and costs, or show by affidavit that he has ground of defence warranting delay.

It is also proposed that the jurisdiction of the local courts shall extend to cases of ejectment between landlord and tenant, where the annual value of the premises does not exceed £20, and the tenant is alleged to hold over; as also to pecuniary legacies of small amount, where the dispute is simply between the executor and legatee, or where all parties interested join in the application to decide on their respective claims on the estate. This last suggestion is traceable to the first Bill brought in by Lord Brougham.

The commissioners think that the present divisions of counties had better be disregarded in mapping out the new jurisdictions; and so far they certainly are right, for the grossest disparity would otherwise prevail amongst the new jurisdictions. They also think that the residence of the defendant ought to determine the venue, provided the plaintiff and defendant reside within twenty miles of each other; but where they are separated by a greater distance, or where the cause of action shall not arise wholly or in some material part in the jurisdiction within which the defendant resides, the superior courts are to have a concurrent jurisdiction as to the claim. In Lord Brougham's Bill, as originally printed, no limitation of this kind was to be found; the action was to be brought in the district where the defendant resided, without reference to the other party's convenience; and in our last Number we made some remarks to show to what manifold evils the enactment would lead. In the course of the debate in the House of Lords, however, Lord Brougham took occasion to say that an entire line had dropped out in the printing of the first copy of his Bill, and that it had been, in fact, his intention from the first to give the superior courts a concurrent jurisdiction, unless both parties resided in the same district. This certainly obviates one material objection to the Bill, though not without making an important deduction from its efficiency. We may also observe, *en passant*, that Lord

Brougham is mistaken in supposing that the omission was occasioned by the dropping out of a line; for the words in question, if printed in the original Bill, would have stood partly in one line and partly in another.

The following is an important point of difference between Lord Brougham and the Commissioners:

“ The jurisdiction of the local courts ought, we think, to be exclusive. It is highly important that there should be uniformity in the practice and process of courts of equal jurisdiction. This, however, would be unattainable if there were other inferior courts, having concurrent jurisdictions with the proposed local courts, but differing from them and from each other in their practice; we therefore recommend that the proposed new courts should have exclusive jurisdiction in all personal suits over which the local court has jurisdiction, except where an option is expressly given to the plaintiff, as before mentioned. This, in effect, would amount to an abolition of the jurisdiction of the inferior courts already existing in personal suits to the extent of £20.”

The Commissioners are of opinion that barristers of ten years' standing at the least should be selected for the office of judge. They calculate that not more than twenty will be required, but if Courts of Requests and all other courts of inferior jurisdiction were abolished, it would be obviously impossible for twenty judges, or even twice twenty, to dispose of all the business that would devolve upon them. They think that the judge should be permanently resident in his district, in order that he may be at hand to discharge the interlocutory business of his court; but they take no notice of the difficulty which his constant absence on circuit must present. They are also mistaken in supposing that one or more registrars, residing at or near the chief place of the district and regularly attending all the courts held within the district, will suffice. The experience of the Scotch courts has shown that a registry and registrar for each circuit town will be required. We gladly call attention to the following remarks:

“ Whilst it is essential, not merely to the convenient, but to the impartial administration of justice, that it should be governed by known and settled rules of practice, it is obvious that this cannot be done without the aid of agents or attornies



who understand such rules, and can apply them. Rules of the simplest construction for the regulation of judicial practice, would in general be too complex to be understood and applied by ordinary suitors. If professional aid were excluded, such rules must either be nugatory, because not observed, or the penalties of non-observance would be enforced at a sacrifice in point of justice."

We wish the Commissioners would also bear in mind that, to procure practitioners of equal character, the individual fees must be even higher in the local than in the metropolitan courts, because a concentration of the business will be impossible. Under the present system all interlocutory and a great deal of other business is done cheap, simply because it is done in the metropolis through the medium of a good system of agency.

In support of the Commissioners' opinion, that regular practitioners will always be found necessary, it may not be useless to state, upon indisputable authority, the consequences that once resulted from the formal abolition of them in France. On this subject M. Treilhard, in the *Exposé des Motifs* prefixed to the French Code of Civil Procedure, expresses himself thus:—

"How can men continue to deceive themselves after the late experiment? Did we not suppress all pleaders and process in a mania for perfection? What was the result? Professional assistance was not the less in request, since the idle and stupid will always be dependent on the industrious and clever: the name of advocate and procureur was dropped, but they continued their business as agents; the only consequence was, that all regular proceedings being suppressed and the practitioner no longer entitled to a fixed remuneration, he contrived to pay himself, even before investigating the matter, much more than formerly, and justice was never so dear."

To obviate the evil consequences now resulting from the misconduct of the bailiffs of inferior courts, it is proposed to require recognizances for good behaviour, and subject them to a summary mode of punishment. Certain rules are also proposed with respect to the execution of process. The following remarks are important:—

"We conceive that the service of a summons, with a brief note of the cause of complaint and particulars, a duplicate being transmitted to the Registrar's office, would constitute at

once a cheap and commodious mode of giving all the information to a defendant which is necessary to enable him to make his defence. This result is now obtained in the county court by a more cumbrous and inconvenient course of proceeding: first, the service of an arrest by seizure of the defendant's goods, which, for the reasons already given, we think objectionable; secondly, the filing of the declaration, of which the defendant takes a copy; thirdly, the obtaining an order for, and delivery of, a bill of particulars.

“ In ordinary cases of debt or assumpsit, all the information that is essential is derived from the bill of particulars, that is, a mere list of the items in respect of which the plaintiff sues, divested of formal technicality. In all such cases no other plaint or declaration is necessary, beyond the mere statement that the plaintiff sues for a debt of £        the particulars of which are annexed. In these cases, and indeed in many which are of a special description, printed forms, with the exception of the dates and particulars, may be used, and may be obtained from the messengers or bailiffs or other persons employed to supply them. Where the cause of action is of a more special description, as where the plaintiff sues for slander, or other special cause of action, a general form cannot be used, and the bill of particulars would not give further information than the plaint itself. But in those as well as all other cases, we recommend that short and simple forms be used, and that the process should be the same by the delivery of duplicates to the messenger, one to be served on the defendant, and the other transmitted to the Registrar's office. We also recommend that the summons should contain a notice to the defendant of the time and place of trial; of the time within which notice of defence must be given in case he means to defend the suit; and of the amount of debt or damages and costs which will be accepted in satisfaction of the claim, provided that sum be paid on or before a day specified, such offer to be without prejudice.

“ The object of the provision last-mentioned is to induce parties to compromise their disputes with the least possible delay and expense, and it seems probable that such a provision would greatly tend to exclude unnecessary litigation, in a manner beneficial to both the litigant parties.”

Liberty is also to be given to pay money into court in all cases, except assault, slander, and libel. Ten days is suggested as a proper period to intervene between the service of the summons and the notice of defence. Here follow the proposed forms of notice. No objections in respect of mere form, not affecting the merits, are to be allowed, but all defects of the kind are to be amendable in a summary manner on the application of either party; neither is misjoinder or nonjoinder, either of causes of action or parties, to prevent the plaintiff from recovering. We are also sorry to find the commissioners sanctioning Lord Brougham's notions as to the inutility of all special and formal pleas whatever:

"We recommend that special pleas be excluded from the practice of the court, because they would, if allowed, be productive of a degree of expense and delay wholly inconsistent with cheapness and expedition, and where the cause of action was small, would be attended, we think, with no equivalent advantage.

"It appears to us that economy and expedition will be best attained by excluding all formal pleas, and enabling the defendant to give all matters of defence in evidence, under a mere notice of defence.

"We think, however, that where the defence does not turn on a mere denial of the plaintiff's case, the notice should specify on what collateral grounds of defence he means to insist, according to the suggestions hereafter contained."

We can understand the reasonings of those who contend that pleading is useless in all cases, but we cannot understand on what principle the commissioners recommend the formal mode of pleading to be followed in the metropolitan courts, and the lax discretionary mode in the local courts; unless indeed we err in supposing that the proper object of pleading is the same in all cases,—to prevent surprise, and lessen expense, by diminishing the required quantity of proof. It is also a singular mark of simplicity to suppose that brevity is best attainable by getting rid of established forms, or rather names, for the essential difference between one of the proposed notices of special defences, and the old special pleas, will be probably exceedingly small. It is a matter of notoriety amongst jurists that written pleadings are long in exact

proportion as they are unfettered by form; and we undertake to say that the system practised in our common law courts is, on an average, full twice as short as any one of the leading continental systems—French, Dutch, German, or Italian—that can be named. In fact, its great error is on the side of brevity, as has been fully proved by the commissioners themselves.

The defendant is to be at liberty to admit any part of the plaintiff's claim, or any facts which he (the plaintiff) would otherwise be obliged to prove; if the notice to this effect be given, the plaintiff is not to be allowed any expenses incurred for the purpose of such proof. Again, we say, if this suggestion be good for anything, why is it not immediately extended to the superior courts. Forms of notices of defence and admission are subjoined. After service of notice of defence the suit is to be considered at issue, without any *similiter* or further pleading. The due attendance of witnesses and jurymen is provided for. The jury is to consist of six; and all persons now liable to serve on assize juries will be liable. The commissioners state that they felt considerable difficulty in determining whether new trials should be grantable, and whether the judgment of the inferior court should be subject to the revision of a superior one. They arrived at length at the following conclusion:

“We recommend that the judge should have power to grant a new trial at the instance of either party, on the ground of any palpable mistake or error on the part of the jury, upon the payment of the costs of the former trial by the party making the application, and giving sufficient security by recognizance for the general costs of suit, and if defendant, also for the debt or damages for which the verdict is given; and that in case of any supposed misdirection or error on the part of the judge, the party thinking himself aggrieved should, on entering into a recognizance with sufficient sureties for the costs of suit and of the appeal, and if defendant, also, for the amount of the debt or damages for which a verdict may have been given, have an appeal to two of the judges of the superior courts.”

If any supposed misdirection or error on the part of the judge be held sufficient to ground an application for an appeal,

there can be little doubt that few parties capable of giving security will rest satisfied with the decision of such dignitaries as these local judges must almost necessarily become. In France, the first judgment is hardly ever abided by.<sup>1</sup> To check appeals by requiring recognizances, would be nearly tantamount to saying that the rich man should appeal and that the poor man should not. The concluding page of the Report contains matter of the highest importance. We shall therefore copy it at length.

“As cases of extraordinary difficulty may sometimes arise, though the cause of action is below the amount of 20*l.*, it seems to us desirable that a judge of any of the superior courts should have power, under such special circumstances, to order a cause commenced in the Local Court to be removed to one of the Courts at Westminster.

“In suits for debts not exceeding the sum of 5*l.*, we think that even still less of machinery may suffice, and that the process should consist merely in service of a summons, served in the manner already stated, giving notice to appear at the next court held at \_\_\_\_\_, on \_\_\_\_\_, in case £ \_\_\_\_\_ for the debt, and \_\_\_\_\_ for the costs were not in the meantime paid.

“That on the appearance of the parties the local judge should, upon examination of the parties themselves and their witnesses, decide in a summary way without a jury, and with power to adjourn the case according to his discretion for further hearing, and with power to stay the execution and give time for payment of the debt by instalments, according to his discretion.

<sup>1</sup> “There is another inconvenience of a far more serious nature, and which may lead to incalculable evil. The courts of First Instance are respected neither by the suitors, nor by the authorities. A judgment open to appeal carries no weight, and magistrates who pronounce it are scarcely looked upon in the light of judges. The real merits of an important case are not gone into before them; the advocates already foresee the discussion which will arise before the court above, and hold in reserve resources of which their adversary is to be kept in ignorance. The authorities intrusted with the appointment of these judges feel no anxiety about using particular care in the composition of the tribunals of First Instance, and fill them with young men who have scarcely completed their education, and who have given no earnest either of merit or capacity. The judges themselves, in their deliberations, give the case a comparatively slight and superficial examination, and leave to the superior judges the task of supplying their inattention.”—(*M. Royer-Collard—Introduction to Mr. Cooper's French Letters.*)

“And that, on default made by the defendant, the plaintiff should be entitled, on proof of the service of the summons, to have execution for the sum sworn to be due.

“In the arrangement of costs, it is necessary to guard against two extremes, each of which would be attended with mischief to the suitor; for whilst the practice of an inferior court must be regulated by a principle of strict œconomy, it is of importance to guard against the mischief which would result from such a reduction of costs as would necessarily exclude the more respectable members of the profession from managing suits, and throw the business into the hands of needy and unprincipled practitioners.

“It would, we think, be advisable that there should be two different tables of costs, one adapted to suits for demands not exceeding 5*l.* in amount, another to those for higher demands. Where more than 5*l.* is demanded, but not more than 5*l.* is recovered, we recommend that the plaintiff should be entitled to costs according to the lower scale only.

“It appears to us, after much consideration, that professional aid in the conduct of a cause, even where the demand does not exceed 5*l.* in amount, ought not to be excluded; and that to require all to appear and plead their causes in person, without regard to age, sex, condition or mental capacity, would frequently be productive of hardship, if not of positive injustice.

“While we think that no party ought to be debarred from availing himself of professional assistance, however small the demand may be, we recommend, for obvious reasons, that such costs shall not be allowed on taxation in any suit to recover a debt not exceeding 5*l.* in amount.”

When the opponents of Lord Brougham's Bill suggested that some of the principal provisions, particularly the intended scale of fees, should be applied to actions to the amount of £20 in the superior courts, leaving actions exceeding that amount as they stand, the anomaly of two modes of proceeding in the same court was confidently relied on in reply. We now find the commissioners proposing a precisely similar distinction. With regard to costs, it cannot be repeated too frequently, that no court can administer justice satisfactorily unless the eventually successful party be allowed to come upon the other for the full costs fairly incurred in the suit.

As the subject of Local Courts will doubtless be revived, we have thought it our duty to put our readers in full possession of the leading features of this Report. Lord Lyndhurst's masterly speeches have fortunately relieved us from the present necessity of commenting at greater length on (what with all due deference we must call) the erroneous views of the commissioners, and the still more erroneous views of the Chancellor. The public are now thoroughly alive to the momentous character of the interests involved in the discussion, and are not again likely to be gulled into the belief that it is the lawyers only who run any risk of suffering from the change.<sup>1</sup> Even the wretched cant about "the poor man's bill" has failed; as if, forsooth, a bitterer curse could be inflicted on the poor than propagating a low and needy set of practitioners to prey upon them! Neither will it henceforth be enough to say that law expenses are oppressively high; the only real question being now well understood to be, whether they had better be reduced by a thorough reform of the old system, or by creating a new and expensive one, of a very dangerous description, in its stead? It is only necessary to keep this steadily in mind to be convinced of the utter irrelevancy of far greater part of what fell from the Chancellor, whose long replies were occupied almost exclusively with descriptions of the abuses of the English courts, both local and metropolitan, as they stand. We mean, of course, after deducting the Billingsgate, which he showered out upon the attorneys and the bar with a liberality almost unprecedented even in him. Every body, however, knew the motive for it: the professional estimate of his character, both as an advocate and a judge, has always been any thing but flattering, and he naturally enough seeks to deprive that estimate of weight.

*H.*

<sup>1</sup> It is singular to compare the intense attention this question has recently attracted with the former apathy concerning it. When, five years ago (No. 2), we first broached the principal arguments against local courts, pointing out the benefits of centralization, and the evils that had resulted both in other countries and in this from a neglect of the principle, we were absolutely accused of useless theorising.



# DIGEST OF CASES.

---

## COMMON LAW.

---

[Comprising 3 Barn. & Adol. Part 5; 1 Nevile & Manning (in continuation of Manning & Ryland), Parts 1 & 2; 2 Tyrwhitt, Part 4; Dowling's Practice Cases, Part 3; Moody & Robinson's Nisi Prius Cases (in continuation of Moody & Malkin), Part 2; and a selection from 5 Carrington & Payne, Part 3.]

---

### ABATEMENT, Plea in.

(*Trial of issue on.*) On the trial of an issue on a plea of abatement of the non-joinder of other joint contractors, the defendant is not entitled to begin without admitting the damages.—*Morris v. Lotan*, 1 M. & Rob. 233.

And see PRACTICE, 8, 41, 46.

### ACCOUNT STATED.

On an account stated, some precise sum must be shown. An admission that *something* is due will not entitle the plaintiff to a verdict with nominal damages.—*Kirton v. Wood*, 1 M. & R. 253.

### ACTION ON THE CASE.

1. (*By reversioner.*) A reversioner cannot sue a stranger for acts of trespass on the land, committed in assertion of a claim of right of way, unless they be attended with some tangible injury to the reversion. (1 M. & S. 234.)  
—*Baxter v. Taylor*, 1 N. & M. 11.

2. (*By author.*) An author may maintain an action for the injury done to his reputation by the publication of an inaccurate edition of his work executed by a third person, provided it be published in such a manner that readers in general would believe the edition to be by himself.—*Archbold v. Sweet*, 1 M. & Rob. 162.

### ADMISSION.

At the first trial, a policy was admitted by the attorney in the following form:  
“It is agreed to admit on the trial of this cause, the execution of the policy, &c.” Tindal, C. J., thought the admission extended to any subsequent

trial or trials, but he saved the point. *Elton v. Larkins*, 1 M. & Rob. 196.

#### AFFIDAVIT.

1. (*In Scotland.*) It was objected to an affidavit sworn in Scotland, that it was sworn before a justice of the peace there, instead of a lord of session, but it was held sufficient.—*Watson v. Williamson*, 1 D. P. C. 607.
2. (*When too old.*) A rule nisi was obtained in Michaelmas Term, 1832, on an affidavit sworn in December 1831. Held, that no rule could be made on so stale an affidavit.—*Burt v. Owen*, 1 D. P. C. 691.

And see PRACTICE, 16, 17, 20, 42.

AMENDMENT. See PRACTICE, 6, 13, 38, 51.

#### ARBITRATION.

1. (*Death of party.*) By the defendant's death after award made in pursuance of a rule of court, no verdict having been entered up, the suit abates, and the Court will not enforce performance of the award by attachment. (7 Taunt. 575.)—*Maffey v. Godwyn*, 1 N. & M. 101.
2. (*Adjudication.*) Where cross actions and all matters in difference are referred to an arbitrator, who decides on the cross actions only, it is no objection to the award that a distinct claim was brought before him on which he has not adjudicated, unless it be averred that he did not take it into his consideration.—*The King v. St. Katharine's Dock Company*, 1 N. & M. 121.
3. (*Setting aside award.*) The fact of the arbitrator's being indebted to one of the parties is no ground for setting aside an award, though the other party was not aware of it when he consented to the reference.—*Morgan v. Morgan*, 1 D. P. C. 611.

And see PRACTICE, 33.

#### ARREST.

1. (*Setting aside on the merits.*) The Court will not set aside an arrest on the merits, unless it be clear from the affidavits that the plaintiff could have no cause of action.—*Burton v. Haworth*, 1 N. & M. 318.
2. A party may be arrested for sums paid by the plaintiff as obligor of an indemnity bond, as for liquidated damages, if the sum he has been called on to pay can be ascertained.—*Anderson v. Bell*, 2 Tyrw. 732.
3. Defendant was illegally taken into custody while a *ca. sa.* was in the sheriff's hands: Held, that the detainer attached, though the original arrest was wrongful.—*Arundel v. Chitty*, 1 D. P. C. 499.
4. (*Where former arrest in foreign country.*) It is no ground of discharge that the party had been before arrested for the same cause of action in France. It was stated that the defendant had escaped from custody in France, but no notice was taken of this circumstance by the Court.—*Allen v. Furnival*, 1 D. P. C. 614.
5. The plaintiff, after the affidavit of debt had been made, received from the defendant a sum sufficient to reduce the demand below the sum for which

an arrest is allowed: Held, that he was thereby precluded from arresting. *Short v. Cunningham*, 1 D. P. C. 662.

6. (*Taking to public house.*) To justify an officer in taking a defendant to a public-house contrary to the 32 G. 2, c. 28, it seems, by the opinion of two judges (Bayley and Gurney, Barons,) against one (Vaughan, B.) that there must be a direct and voluntary consent on the part of the party arrested. It is not enough that he did not express any dissent.—*Dewhirst v. Pearson*, 1 D. P. C. 664.

## ARSON.

A building 100 yards distant from any house, which had been built for a brick-oven, but afterwards roofed and a door put to it, and in which prosecutor kept a cow, is not an outhouse within 7 & 8 G. 4, c. 30, and arson cannot be committed in respect of it.—*Rex v. Haughton*, 5 C. & P. 555.

## ATTORNEY.

1. (*Liability of.*) An attorney is not liable for a mistake in a point of law on which reasonable doubt may be entertained.—*King v. Burt*, 1 N. & M. 262.
2. (*Taxation of bill.*) An attorney's bill for business done in the County Court is taxable: and the preparing of a replevin bond is business done in the county court. (4 T. R. 124, 496; 5 T. R. 694; 6 T. R. 645; 3 B. & A. 486.)—*Wardle v. Nicholson*, 1 N. & M. 355.
3. (*Taxation of bill.*) An attorney, who had claims on his client for charges at law and also for conveyancing business, received monies generally on account: Held, that these payments could not be applied to the common law items, so as to render the bill no longer taxable.—*James v. Child*, 2 Tyrw. 732.
4. An application cannot be made against an attorney at chambers, unless there be a cause in court.—*Exp. Higgs*, 1 D. P. C. 495.
5. The Court refused to compel an attorney, into whose hands money had come in consequence of misrepresentations on his part, to pay it over with interest, but granted the rule as to the principal.—*Fenn v. Wild*, 1 D. P. C. 498.
6. (*Re-admission.*) The Court refused to permit an amended affidavit in support of a motion to re-admit an attorney, to be produced at chambers; saying that these matters must always be settled in open Court during term. *Exp. Owen*, 1 D. P. C. 511.
7. (*When liable to attachment.*) The Court will not interfere to attach an attorney for non-fulfilment of an undertaking, unless he is engaged in the cause in which it is given.—*Exp. Watts*, 1 D. P. C. 512.
8. (*Notice of admission.*) An attorney applying to be re-admitted, had stuck up his notice at the opening of the K. B. office on the 2d Nov.: the 1st Nov. was a holiday: Held sufficient.—*Exp. Senior*, 1 D. P. C. 517.
9. A judgment cannot be set aside because signed by an uncertificated attorney.—*Smith v. Wilson*, 1 D. P. C. 545.
10. (*Privileged communication to.*) The protection of communications made

by a client to his attorney applies to all cases in which the relation of client and attorney subsists, and where the client applies to the attorney in his professional character. (2 B. & B. 4. See 1 C. & P. 158, 3 C. & P. 518, *contra*.)—*Doe d. Shellard v. Harris*, 5 C. & P. 592.

11. (*Privileged communication*.) Where two parties have one attorney, a communication by one to the attorney in his common capacity is not privileged as regards the other.—*Baugh v. Cradocke*, 1 M. & Rob. 182. *Cleve v. Powel*, 1 M. & Rob. 229.

12. Where only one of three attorneys acting in partnership was admitted in the Court (the Palace Court) in which the business was done: Held, that an action in the names of the three was not maintainable, though an express promise had been made to them.—*Arden v. Tucker*, 1 M. & Rob. 191.

And see INSOLVENT DEBTOR, 1.—KING'S BENCH PRISON.

#### BAIL.

1. (*Notice of bail*.) The notice omitted the number of the house of a bail residing in a numbered street. The Court gave the plaintiff, who had found the bail, the option of further time to inquire about them, or of his costs of affidavit and appearance in case they justified at once.—*Muir v. Smith*, 2 Tyrw. 742.

2. (*Costs*.) Costs of bringing up bail to justify allowed, where they have given notice of putting in and justifying at the same time, accompanied by an affidavit of justification, and after exception attend to justify, and are not opposed.—When the notice of bail was to *add* and justify at the same time, and was regularly served, and the new bail were substituted by a judge's order on the morning of justification, the costs of opposition were not therefore allowed, but time was offered to inquire after them.—*Bowman v. Russel*, 2 Tyrw. 744.

3. (*Giving time*.) The defendant requested time: the plaintiff replied that he might rely on his honour: Held to discharge the bail.—*Ladbroke v. Hewett*, 1 D. P. C. 488.

4. (*Residence*.) It is not necessary that the bail should *sleep* in the place mentioned in the notice as his residence: it was held sufficient that he had a servant sleeping there, and took refreshments there occasionally.—*Thomson's bail*, 1 D. P. C. 497.

5. (*Description*.) It is sufficient to describe bail as of a place well-known as a village (as of Chigwell Road) without specifying any street.—*Smith's bail*, 1 D. P. C. 499.

6. (*Notice*.) In a notice of bail, to describe jewellers' clerks as jewellers is a misdescription.—*Hamlet's bail*, 1 D. P. C. 501.

7. (*Notice*.) Four days' notice is not required in the case of a prisoner.—*King's bail*, 1 D. P. C. 509.

8. (*Costs of justification*.) The bail had made the affidavit required by Reg. G. 3 T. T. 1 W. 4, and were excepted to. They came up to justify, but the plaintiff did not appear to oppose them, and they justified: Held that defendant was entitled to the costs of justification.—*Johnson's bail*, 1 D. P. C. 514.

9. (*Affidavit of sufficiency.*) In the affidavit of sufficiency, the bail stated that they were not bail "for any," without adding "other person or in any other cause:" Held sufficient.—*Smith's bail*, 1 D. P. C. 514.
10. (*Notice to prisoner.*) A notice to a prisoner to put in and justify bail at the same time, must state that he is a prisoner.—*Creighton's bail*, 1 D. P. C. 609.
11. (*Costs.*) Bail cannot be opposed on the ground that the costs of proceedings on the bail-bond had not been paid.—*Wilson's bail*, 1 D. P. C. 614.
12. (*Giving time.*) An order that an attorney's bill, on which the action was brought, should be taxed, was drawn up by mistake as a stay of proceedings: Held, that as there was no actual stay, the bail were not thereby discharged. An agreement between the plaintiff and defendant that the bill should not be taxed, was held not binding on the bail.—*Woosman v. Wood*, 1 D. P. C. 681.
13. (*Setting aside bond.*) To set aside proceedings on a bail-bond, it is not sufficient that the affidavit states that the defendant had a good defence to the original action; it must state that he had a good defence on the merits. *Hallett v. Aubrey*, 1 D. P. C. 688.

## BANKRUPTCY.

1. (*What a levying within 6 G. 4, c. 16, s. 81.—Computation of time.—Construction of s. 108.*) Under a *fi. fa.* founded on a warrant of attorney, the sheriff seized at 11 o'clock on the 13th August; at one o'clock on 13th October a commission issued against the debtor, on an act of bankruptcy committed in June: the sale had previously taken place: Held, 1st, that the seizure was a *levying* within s. 81 of the Bankrupt Act, (*Giles v. Grover*, 9 Bing. 128); 2dly, that more than two months intervened between the seizure and the issuing of the commission (1 Mont. & Mac. 7); 3dly, that s. 108 of the Bankrupt Act applies only to judgments upon which execution has been levied within two calendar months before the date of the commission, and does not over-ride s. 81.—*Godson v. Sanctuary*, 1 N. & M. 52.
2. (*Mutual credit.*) A., a creditor of B., employs him to repair a carriage for ready money: B. becomes bankrupt: A. cannot set off part of his debt against the repairs, and the assignee may refuse delivery of the carriage without payment for the repairs, whether they were completed before or after the bankruptcy. (2 M. & S. 510; 9 B. & C. 738.)—*Clarke v. Fell*, 1 N. & M. 244.
3. (*Concerted act of bankruptcy.*) A concerted commission or fiat is protected by 1 & 2 W. 4, c. 56, s. 42; but a concerted act of bankruptcy is still a nullity.—*Marshall v. Barkworth*, 1 N. & M. 279.

And see EVIDENCE, 11, 12.—INDICTMENT, 1.

## BEER ACT.

*Semble*, that a license to sell beer, although obtained by fraud, is valid, unless the fraud be practised by the party licensed.—*The King v. Minshull*, 1 N. & M. 277.

**BILL OF EXCHANGE.**

(*Striking out indorsement.*) After a bill had been put in and read, Denman C. J. allowed the bill to be handed back, and an indorsement, objected to as a fatal variance, to be struck out.—*Mayer v. Jadis*, 1 M. & Rob. 247. And see PRACTICE, 4.

**BOND.**

(*Assignment of breach.*) If the breach of the condition of a bond be well assigned in other respects, it is not vitiated by the addition of immaterial allegations.—*Stothert v. Goodfellow*, 1 N. & M. 202.

**BURGLARY.**

A booth used only for the purposes of a fair, but having wooden doors and windows bolting inside, is a sufficient dwelling wherein burglary may be committed.—*Rex v. Smith*, 1 M. & Rob. 256.

**CERTIFICATE FOR IMMEDIATE EXECUTION.**

1. The act authorising certificates for immediate execution was for some time considered not to extend to cases of debt on simple contract, and Lord Tenterden so ruled it: but this is now altered: nor is the act confined to cases of *contract* at all.—*Percival v. Alcock*, 1 M. & Rob. 167; *Younge v. Crooks*, ib. 220; *Barden v. Cox*, ib. 203.

And Parke, J., applied it also in a case where a verdict was taken by consent, though no consent was given as to the time of execution.—*Anon.* 1 M. & Rob. 167.

2. Affidavits were admitted by Bayley, B., in support of an application for immediate execution. (*Gervas v. Burtchley*, 2 M. & M. 150, *contrà.*)—*Ruddick v. Simmons*, 1 M. & Rob. 184.

**CERTIORARI.**

Where a case is granted by the sessions, a *certiorari* to remove the proceedings must be sued out within six months, though the case be not settled within that time.—*Rex v. Justices of Staffordshire*, 1 D. P. C. 484.

(*Return.*) The return to a *certiorari* must return the record itself, not merely its tenor.—*Askew v. Hayton*, 1 D. P. C. 510.

And see OVERSEERS, 1.

**CLERGY.**

1. (*Charge on benefice.*) The defendant, a beneficed clergyman, executed an indenture whereby his benefice became charged with an annuity, and a warrant of attorney to secure the same. By the indenture it was agreed that no execution or sequestration should be issued or taken out upon the said judgment (other than such sequestrations as were therein mentioned) unless the annuity should be in arrear, and the defendant covenanted that, in case the plaintiff should at any time deem it expedient to sequester the said or any future benefice of the defendant, it should be lawful for him to issue any writ of sequestration upon the said judgment to be entered up on the said warrant, and sequester the same. The annuity becoming in arrear, the grantee entered up judgment and sued out a writ of sequestration for

the full sum mentioned in the warrant. The Court refused to set aside the deed, &c. but directed that the writ of sequestration should continue in force only for the arrears actually due. (1 B. & Ad. 673.)—*Britten v. Wait*, 3 B. & A. 915.

2. (*Action for penalties for non-residence.*) The written notice required by 57 G. 3, c. 99, s. 40, to be given to the bishop before the commencement of an action for penalties for non-residence, must be left at the registry-office: it is not good service to leave it in the hands of the registrar or his deputy. It need not be served by the attorney who sued it out.—*Vaut v. Vollans*, 1 N. & M. 307.

3. (*Charge on benefice.*) A warrant of attorney, the defeazance to which recites that it is given to secure payment of an annuity, and authorizes the plaintiff to issue a *fi. fa. de bonis ecclesiasticis*, but does not state that it is given for the purpose of charging the defendant's benefice, is valid, although it refer to an annuity-deed of the same date, wherein the benefice is directly charged. (2 B. & Adol. 734; 4 Bligh. 27, N. S.)—*Colebrooke v. Layton*, 1 N. & M. 374.

4. (*Sequestration of benefice for non-payment of curate.*) The requisition by the bishop to a resident incumbent, under 57 Geo. 3, c. 99, s. 30, to nominate a curate with the stipend named, is in the nature of a judgment affecting the incumbent's character and property; and therefore, unless opportunity be afforded to him to show cause against the issuing of it, the bishop cannot proceed to the appointment of a curate, and, the sequestration of the living for payment of his stipend; and the incumbent may sue the sequestrators in such case for the profits of the living received by them, in an action for money had and received.—*Capel v. Child*, 2 Tyrw. 689.

### CONSISTORY COURT.

The Consistory Court has power to order one of its officers to pay over a sum of money which has come into his hands without consideration.—*Morris v. Gardner*, 1 D. P. C. 525.

### CONTRACT.

(*To hire carriage.*) The defendant hired a gig of the plaintiff on a stipulation that the defendant should keep it in perfect repair: Held, that this included repairs rendered necessary by an accident not brought about by the default of the defendant.—*Reading v. Menham*, 1 M. & Rob. 234.

### CORPORATION.

1. (*Authority of directors.*) The charter of incorporation of a manufacturing company required the assent of the corporate body, convened in a particular manner, to the affixing of the corporate seal by the directors, to whom the legal custody of it was given. The directors affixed the seal to a deed granting a retiring annuity to an officer of the company in consideration of past services, subject to a proviso restraining him from engaging in the manufacture of the article: Held, first, that they had authority to do so; secondly, that it lay upon the corporate body, repudiating their act, and impugning their authority, to show that the requisite assent was not for-



mally given. (3 B. & Ald. 1.)—*Clarke v. Imperial Gas Light Company*, 1 N. & M. 206.

2. (*Bye Law*.) Where a charter of incorporation authorizes the corporators to elect a master *de se ipsis*, a bye law narrowing the number of *electors* is valid, (4 B. & C. 781; 7 Bing. 1;) and its existence may be judicially inferred from ancient usage, without the intervention of a jury. Nor will it be inferred from the circumstance of the election by the limited body having almost uniformly fallen on members of that body, that the bye law also limited the number of the *eligible*; nor will the Court, on that ground, give leave to file a *quo warranto* for the purpose of investigating the title of a master so elected.—*Rex v. Attwood*, 1 N. & M. 286.

### COSTS.

1. (*Under 43 Geo. 3, c. 46.*) A defendant arrested under a misapprehension by the plaintiff of a questionable point of law, is not therefore entitled to costs.—*Stovin v. Taylor*, 1 N. & M. 250.
2. (*Under 43 Geo. 3, c. 46.*) Plaintiff sold and delivered goods to defendant; defendant objected to their quality, and plaintiff agreed to take them back. They were returned accordingly, and plaintiff afterwards sent them again to defendant, and arrested him for their value, (£37.) He had a verdict for the value of part only, (£15.) The defendant was held entitled to costs.—*Linley v. Bates*, 2 Tyrw. 753.
3. (*Of one of several defendants in trespass.*) Three defendants, sued for assault and false imprisonment, appeared by one attorney, but severed in pleading. The same evidence was adduced for all, except one witness called for one of them only. That one was acquitted: Held, that he was entitled to receive from the plaintiff on taxation (satisfying the master that he was not indemnified,) his aliquot proportion of the costs incurred by the three on their joint retainer, as well as the costs he had separately incurred. (4 B. & A. 700.)—*Griffiths v. Kynaston*, 2 Tyrw. 757.
4. (*Of indictment.*) The 7 Geo. 4, c. 64, s. 22, (as to allowing costs of prosecution,) does not apply to cases where the indictment had been removed into the Court of K. B. by *certiorari*. (8 B. & C. 420.)—*Rex v. Kelsey*, 1 D. P. C. 481.
5. The declaration contained three counts. The verdict was entered for the plaintiff on one count, and for the defendant on the two others. All the plaintiff's witnesses were necessary in support of the count found for him; and all the defendant's witnesses were as necessary for one count as the others: Held, that the defendant was not entitled to the costs of the issues found for him.—*Richards v. Cohen*, 1 D. P. C. 534.
6. In an action of libel there were ten defendants; three of them demurred to some of the counts, and went to issue upon the rest; the others did not demur, but pleaded. Judgment on the demurrer being given for the three, they immediately gave notice that they should proceed to tax their costs on the demurrer: Held, that they were not entitled so to do.—*Forbes v. Gregory*, 1 D. P. C. 679.
7. (*Where demand necessary.*) Costs had been duly demanded, when by a

judge's order a reduction was made: Held, that a fresh demand of the reduced sum was necessary to found an attachment.—*Spiry v. Webster*, 1 D. P. C. 696.

8. (*Under 43 Geo. 3, c. 46.*) The Court allowed the defendant his costs under 43 Geo. 3, c. 46, s. 3, as for an excessive arrest, though the account was long and intricate, it appearing that the plaintiff had been guilty of negligence in making it up.—*Hall v. Forget*, 1 D. P. C. 696.

9. (*After offer to pay.*) The defendant offered to pay part of a demand, which the plaintiff refused; the defendant then paid the money into Court, and the plaintiff took it out: Held, that the defendant was entitled to costs from the time of the offer.—*Marryott v. Clapp*, 1 D. P. C. 701.

And see PRACTICE, 32.

### COUNSEL.

Where a party appears in person, he cannot have counsel to examine witnesses for him.—*Shuttleworth v. Nicholson*, 1 M. & Rob. 254.

### COURT OF REQUESTS.

1. (*Jurisdiction of London Court of Requests.*)—The master of a vessel trading between London and Rotterdam, having a place of residence in Southwark, but occasionally transacting business at the quay in London, where his vessel is moored, is not within the jurisdiction of the London Court of Requests.

An action for use and occupation is not within the exception<sup>1</sup> stated in the 39th and 40th Geo. 3, c. 104.—*Double v. Gibbs*, 1 D. P. C. 583.

2. To take advantage of a Court of Requests' Act to deprive the plaintiff of costs, the defendant must bring himself directly and expressly within the words of the Act.—*Newton v. Peacock*, 1 D. P. C. 677.

3. (*Westminster.*) Under the Westminster Court of Requests' Act, (23 Geo. 2, c. 27,) persons seeking their living in Westminster are not privileged from being sued elsewhere for debts under 40s. The statute exempts only *inhabitants and residents*.—*Scotts v. Seager*, 1 M. & Rob. 244.

### COVENANT.

1. (*To repair, what a breach of.*) Covenant to repair and keep in repair a dwelling-house, with all such buildings, *improvements, or additions*, as should be erected, set up, or made by the lessee. The lessee enlarged the windows, opened a new external door, and took down an internal partition: Held, no breach of the covenant. (22 Vin. Abr. 439; 10 H. 7, fol. 2, pl. 3.)—*Doe d. Dalton v. Jones*, 1 N. & M. 6.

2. (*For not repairing.—New trial.*) In an action of covenant for non-repair, the question is whether the covenant to repair had been substantially,

---

<sup>1</sup> In the marginal note it is stated that an action for use and occupation is not within the Act, but as we understand the report, the decision was as stated above. The excepting clause in the act is, "that this act shall not extend to any debt where any title of freehold or lease for years of any lands or tenements shall come in question."—See the report of the same case in Crompton & Meeson, part 2.

complied with. Minute damage, as the non-repair of the broken glass of a sky-light, is not sufficient to constitute a breach.

Where the verdict is for the defendant, the Court will not grant a new trial to enable the plaintiff to recover nominal damages.—*Harris v. Jones*, 1 M. & Rob. 173.

#### CUSTOM.

(*Not destroyed by union of parishes.*) Two parishes, in each of which a custom existed as to the appointment of parish clerk, were united by statute: Held, that the custom remained.—*Hartley v. Cook*, 5 C. & P. 441.

#### DEBTOR AND CREDITOR.

A creditor who states the debt due to him from a debtor who is entering into a composition to be a certain sum, less than the fact, agrees to execute a release, and receives a dividend on that sum, cannot afterwards sue the debtor for the residue.—*Seager v. Billington*, 5 C. & P. 456.

#### DISTRESS.

1. (*Tender of expenses, &c.*) Tender of rent and expenses is sufficient if made to the landlord; it need not be made to the broker who distrains. (5 Taunt. 307.)—*Smith v. Goodwin*, 1 N. & M. 371.
2. Under a count for not selling the goods distrained at the best prices, the plaintiff may go into evidence that they were improperly lotted, and were allowed to stand in the rain.—*Poynter v. Buckley*, 5 C. & P. 512.
3. When the tenancy has been determined by notice to quit, the tenant holding over is not liable to a distress.—*Jenner v. Clegg*, 1 M. & Rob. 213.

And see POOR RATE, 1.—TROVER, 1.

#### DEVISE.

(*Words passing a fee.*)—The will began, "as for such temporal estate as God has given me, I give, devise, and dispose of it as follows." Then followed a devise of real estate to A., without words of inheritance, and a residuary clause confined to personalty: Held, that there was not sufficient to give A. a fee.

There was also a devise of land to B., without words of inheritance, and if he died under eighteen, it was to descend and go to A.; A. was not the heir at law: Held, that the devise over raised no presumption of an intention to give the fee to A. (7 Bing. 664.)—*Doe d. Knocker v. Ravell*, 2 Tyrw. 719.

#### EASEMENT.

The use of a piece of ground as a timber yard and saw pit for twenty years does not give the owner such an exclusive right to the light and air as to enable him to maintain an action against a person obstructing them by building.—*Roberts v. Macord*, 1 M. & Rob. 230.

#### EAST INDIA COMPANY.

The Directors of the East India Company transmitted to the Board of Control a despatch headed "Political Department," and on alterations being

introduced by the Board, discussed them upon the merits, without asserting that the matter of the despatch did not relate to the civil or military government or the revenues of India: Held, that they could not afterwards refuse to transmit to India the altered despatch, either on the ground that its matter was purely commercial, or that the Board of Control itself had power to originate a despatch in the altered form, and that the Company had rescinded the resolution on which the original despatch was framed; and the Court of K. B. issued a mandamus, and refused to suspend it to give time for an appeal. (33 Geo. 3, c. 52, ss. 9—16.)—*The King v. East India Company*, 1 N. & M. 335.

### EJECTMENT.

1. It is no defence at Nisi Prius that the declaration in ejectment was irregularly served.—*Doe d. Rankin v. Brindley*, 1 N. & M. 1.
2. The Court refused a rule for judgment against the casual ejector, where two terms had been suffered to elapse since the service of the declaration.—*Doe v. Roe*, 1 D. P. C. 495.
3. Where the title of the landlord accrues during Hilary Term, and the property is in Middlesex, the 11 Geo. 4 and 1 Wm. 4, c. 70, s. 36, does not apply.—*Doe d. Norris v. Roe*, 1 D. P. C. 547.
4. (*Service.*) Service on the mother of the tenant is not sufficient.—*Doe d. Smith v. Roe*, 1 D. P. C. 614.
5. (*Service.*) Service on an attorney, who was sworn to be, to the best of deponent's knowledge and belief, the attorney of the mortgagee in possession, was held insufficient without an acknowledgment.—*Doe d. Collins v. Roe*, 1 D. P. C. 613.
6. (*Service.*) The declaration was delivered and explained to a daughter of the tenant, who said her father was upstairs and ill, but that she would go up and explain it to him, which she afterwards said she had done: Held sufficient.—*Doe d. Cockburn v. Roe*, 1 D. P. C. 692.
7. (*Service.*) Service on the wife at the husband's residence is sufficient, though the premises be uninhabited.—*Doe d. Wingfield v. Roe*, 1 D. P. C. 693.

And see EVIDENCE, 15; PRACTICE, 10, 11, 27.

### ELECTION TO PARLIAMENT.

(*Costs of petition.*) The costs of opposing a petition may be recovered against any one of the persons signing it.—*Gurney v. Gordon*, 2 Tyrw. 616.

### ESCAPE.

(*Notice of.*) In the case of an escape, the marshal, if served with the common side bar rule to bring the defendant into Court, or give an acknowledgment in writing, &c., must give notice of the escape to the plaintiff's attorney within the time limited by the rule.—*White v. Stratton*, 1 D. P. C. 550.

And see SHERIFF, 2.

**ESTATE.**

1. (*Discontinuance.*) Lands were limited to A. for five hundred years, remainder to B. in tail, remainder to C. in tail, reversion to B. in fee. B. levied a fine with proclamations to the use of himself in fee: Held, that though A.'s term continued, B.'s estate was thereby discontinued, and C.'s remainder in tail divested.

B. died without issue, having devised to G. during C.'s life, remainder to D., C.'s son and heir, for life. C. entered, suffered a recovery, devised to D. for life, and died. D. entered: Held, that D. was not remitted. It was conceded that C. was not remitted, and that his recovery was void. (Co. Litt. 133 b. 332; 5 Cruise's Dig. 163; 5 Co. Rep. 123; 2 Burr. 704; 1 H. Bl. 269.)—*Doe d. Cooper v. Finch*, 1 N. & M. 130.

[See observations on this case, Law Mag. vol. ix. p. 82; and Mr. Manning's learned note at p. 172 of this report.

2. Bequest of leaseholds to A., in trust to permit B., the testator's widow, to take and receive the rents during her widowhood, and on her death or remarriage, in trust to sell and divide the proceeds between testator's sons C. and D. A., B., and C. joined in a lease to D. for the residue of the term, reddendum to B. and C., with power of re-entry to A., B., and C., and the survivor; A., the trustee, having died: Held, that the legal estate vested in A. only, and B. therefore could not exercise the power of re-entry. (4 Taunt. 23; 2 Tyrw. 289.)—*Doe d. Barker v. Goldsmith*, 2 Tyrw. 710.

**EVIDENCE.**

1. (*Of service.*) The practice in an attorney's office was for the person serving a notice to quit to indorse on the duplicate at the time of the service the fact of his having served the original; and it was proved that the attorney took the notice in question with him, with the view of serving it, and that the indorsement of service on the duplicate was in his hand-writing: Held, that after his death the indorsement was admissible evidence of the service.—*Doe d. Pattershall v. Turford*, 3 B. & Ad. 890.
2. (*Letter from Attorney.*) The fact of a party being defendant's attorney in the action is not of itself sufficient proof of authority to make a letter written by him with reference to the subject in dispute, but before action brought, admissible against the defendant as evidence of a fact admitted in the letter. (4 Campb. 133; 3 C. & P. 380.)—*Wagstaff v. Wilson*, 1 N. & M. 4.

(*Production of written instrument.*) In an appeal against an order of removal, the respondents proved a contract of renting, without its appearing in the course of their case that it was in writing. The appellants called a witness who proved it was in writing: Held, that *they* were bound to produce it or procure its production.—*The King v. Inhabitants of Padstow*, 1 N. & M. 9.

4. (*Evidence to contradict party's own witness.*) When, on an issue whether plaintiff was interested in goods destroyed by fire, a witness called for plaintiff swore that invoices and letters of advice purporting to be written

by him in Edinburgh were fabricated in London by plaintiff's direction, it was held that plaintiff had a right to call other witnesses to show the genuineness of the documents. (3 B. & C. 746.)—*Friedlander v. London Assurance Company*, 1 N. & M. 30.

5. (*In action against Sheriff.*) Admissions by the under-sheriff, not accompanying an act done in his official character, are not receivable to charge the sheriff.—*Snowball v. Goodricke*, 1 N. & M. 234.
6. (*Production of writing to be stamped.*) Where two duplicate originals of an agreement by a tenant with his landlord to keep the premises in repair were mutually signed, and one kept by the landlord; his assignee, suing for a breach of the agreement, cannot call upon the tenant to produce his part to be stamped, for he should have applied to his assignor, or have shown that he was not to be found.—*Travis v. Collins*, 2 Tyrw. 726.
7. (*Entries in vestry books and register.*) Old entries in the vestry books of a parish are not evidence to show the right of election of a parish clerk, unless it appear that the parson was present. But extracts from the register of the bishop of the diocese are.—*Hartley v. Cook*, 5 C. & P. 441.
8. (*Where parol admissible.*) The terms of a written contract cannot be varied by parol unless they were written fraudulently.—*Hills v. Warner*, 1 D. P. C. 686.
9. (*Privileged communication.*) A letter written to the chief secretary of the Postmaster-General by a private person, complaining of the guard of a mail-coach, was held not to be privileged; but if a *bona fide* and fair communication, such a letter cannot be made the subject of an action, though some of the charges may not be true.—*Blake v. Pilford*, 1 M. & Rob. 198.
10. The opposite attorney cannot be asked if he has in Court the rule for payment of money into Court, no notice to produce having been given, or *spá. duces tecum* served.—*Cook v. Hearn*, 1 M. & Rob. 201.
11. (*Bankrupt.*) The declarations of the petitioning creditor (since dead) made subsequent to the commission, are not evidence against the assignees in an issue to try whether the commission was concerted between the bankrupt, the petitioning creditor, and the attorney for the commission.—*Harwood v. Keys*, 1 M. & Rob. 204.
12. (*Bankrupt.*) A statement made by a trader respecting his absence on a former occasion when the same creditor called, is not admissible to prove such absence an act of bankruptcy, on the ground that it was not a part of the *res gesta*.  
The breach of an appointment to meet the creditor at his (the creditor's) residence is not an act of bankruptcy.—*Lees v. Marton*, 1 M. & Rob. 210.
13. Debt on bond; plea, usury. Held, that the record of an action brought by the present defendant against the plaintiff for penalties under the statute of Anne for usury, in which the defendant had a verdict, was admissible.—*Clere v. Powel*, 1 M. & Rob. 228.
14. (*Notice to produce.*) Where the attorney is changed, a notice to produce served on the first attorney is sufficient to let in secondary evidence.—*Doe d. Martin v. Martin*, 1 M. & Rob. 242.

15. In ejectment, in order to prove that the mortgagee had interfered with the premises, a carpenter's bill and receipt for work done thereon for the mortgagee, and found among his papers after his death, were offered in evidence. Held inadmissible. (10 East, 109.)—*Doe d. Gallop v. Vowles*, 1 M. & Rob. 261.

16. Declarations by the wife or husband, that a child born during wedlock is not the husband's child, are inadmissible on an issue to try the legitimacy of the child. An entry in the baptismal register describing the child as illegitimate, is not admissible to prove that fact.—*Cope v. Cope*, 1 M. & Rob. 269; 5 C. & P. 604.

17. (*Confession.*) A statement relating to an offence, made on oath by a party not then under suspicion, is evidence against him when subsequently charged with the offence.—*Rex v. Tubby*, 5 C. & P. 530.

#### EXECUTORS AND ADMINISTRATORS.

The lending by one executor to the other of the assets of their testator, is a misapplication of those funds, and an improper discharge of the trust; so that if any loss results, the estate of the lending executor is liable for the amount.—*Gleadow v. Atkin*, 2 Tyr. 593.

And see LANDLORD AND TENANT, 2.

#### FALSE PRETENCES.

Where a party obtained goods by delivering a forged letter, "please to let the bearer A. B. have for C. D. four yards of linen," signed C. D., Held a felony under 1 Will. 4, c. 66, s. 10, and that therefore an indictment for obtaining by false pretences could not be supported.—*Rex v. Evans*, 5 C. & P. 553.

#### FORCIBLE DETAINER.

(*Conviction for.*) A conviction for a forcible detainer under 8 Hen. 6, c. 9, must show also an *unlawful* entry.—*The King v. Oakley*, 1 N. & M. 58.

#### FRAUDS, STATUTE OF.

1. The defendant held premises as tenant to the plaintiff, at £50 a year, for a term of which several years were still to come. The landlord agreed by parol to lay out £50 in improvements, the tenant undertaking to pay him an additional rent of £5 a year, to commence from the quarter before the completion of the work. The improvements were completed within four months from the making of the agreement. Held, that this was not an agreement within the statute of frauds, and that the landlord was entitled to recover the additional rent. (7 Taunt. 157.)—*Donellan v. Rehd*, 3 Barn. & Ad. 899.

2. (*Parol order.*) A parol order for five vats was given by the defendant, at the price of £18, and four were delivered. Held, that the defendant not having objected to receive them within a reasonable time, was liable for the price of the whole.—*Coleman v. Gibson*, 1 M. & Rob. 168.

#### FRIENDLY SOCIETIES.

The authority given to justices by 10 Geo. 4, c. 56, s. 6, to inquire into the propriety of the tables of payments and benefits in friendly societies, does



not apply to pre-existing societies.—*The King v. Justices of Somerset*, 1 N. & M. 252.

## HIGHWAYS.

(*Surveyor's accounts.*) A mandamus was granted to compel a surveyor to produce and pass his accounts, the time for so doing having elapsed.—*Rex v. Lewis*, 1 D. P. C. 531.

## HOMICIDE.

There cannot be an unlawful killing of a child until it has had an independent circulation.—*Rex v. Enoch*, 5 C. & P. 539.

## HULL DOCK COMPANY.

Vessels taking in any part of their cargo in the port of Goole, and proceeding with it to Hull, are liable to pay the Hull Dock Company's tonnage duties under 42 Geo. 3, c. 91, s. 44. But not vessels proceeding to Hull from a place above Goole, (as Leeds,) and not touching at Goole, but only passing the entrance into that port.—*Hull Dock Company v. Priestley*, 1 N. & M. 85.

## HUNGERFORD MARKET COMPANY.

The Hungerford Market Act, 11 Geo. 4, c. 70, authorized the Company to purchase the hereditaments mentioned in a schedule, and to give a written notice to persons interested to send in their claims, and in case of their refusing to treat, to have the value assessed by a jury. Held, that after giving such notice, the company could not abandon the purchase; and the Court directed a mandamus for the issuing of the statutory process for summoning a jury to assess the value.—*The King v. Hungerford Market Company*, 1 N. & M. 112.

## HUSBAND AND WIFE.

1. (*Appearance for.*) The Court refused to set aside an appearance entered by an attorney for husband and wife, as it appeared that the attorney had been authorised to enter it by the wife.—*Williams v. Smith and Wife*, 1 D. P. C. 632.
2. A wife cannot commit a trespass on the property of her husband, but she may be indicted for a forcible entry amounting to a breach of the peace.—*Rex v. Smyth*, 1 M. & Rob. 155.
3. A husband is liable, on an express promise, to pay the debt of the wife living apart with a sufficient allowance from him at the time the debt was contracted.—*Harrison v. Hall*, 1 M. & Rob. 185.

And see SLANDER, 1.

## ILLEGAL CONTRACT.

The principal cannot recover from the agent money paid away in illegal disbursements (as for bribes at an election) with the privity of the principal.—*Bayntun v. Cattle*, 1 M. & Rob. 265.

## INDICTMENT.

1. (*For conspiracy to embezzle bankrupt's goods.*) Such indictment must state the trading, petitioning creditor's debt, and the becoming bankrupt;

it is not sufficient to state that a commission issued, under which the party was duly found and declared a bankrupt.—*The King v. Jones*, 1 N. & M. 78.

2. In an indictment, *parish aforesaid* refers to the parish last-mentioned.—*Rex v. Richards*, 1 M. & Rob. 177.

3. (*For conspiracy.*) An indictment for conspiring to prevent *the* workmen of J. G. from working in his colliery, is supported by evidence of a conspiracy to prevent *any* of them.

Notwithstanding 6 Geo. 4, c. 120, it is illegal for workmen to combine for the purpose of dictating to the master whom he shall employ.—*Rex v. Byerdike*, M. & Rob. 179.

4. (*For perjury: evidence.*) If on an indictment for perjury the prosecutor gives no evidence on one of the assignments, the defendant cannot give evidence to disprove that assignment.—*Rex v. Hemp*, 5 C. & P. 468.

5. (*For poaching.*) “A certain cover in the parish of A.” is too vague a description in an indictment for poaching.—*Rex v. Crick*, 5 C. & P. 508.

6. (*On riot act.*) An indictment on the riot act, for remaining assembled an hour after proclamation, in setting out the proclamation omitted the words “of the reign of.” Held a fatal variance.—If the proclamation be read several times, the hour is to be computed from the first reading.—*Rex v. Woolcock*, 5 C. & P. 516.

7. (*Property, how laid.*) A book which had been presented to and bound at the expense of a society of Wesleyan Methodists, was stolen from their chapel. A. stated that he was one of the trustees, but no trust deed was produced. The property was held to be well laid in A. and others.—*Rex v. Boulton*, 5 C. & P. 537.

#### INSOLVENT DEBTOR.

1. (*Fraudulent omission of debt from schedule.*) An attorney employed by an insolvent to prepare his schedule, omits, with the insolvent's privity, to insert his own debt: *Semble*, that this is not such a fraud as will destroy his right of action for the debt.—*Howard v. Bartolozzi*, 1 N. & M. 69.

2. The Court refused to interfere in favour of an insolvent detained for rent which became due since his discharge.—*Brookes v. Hutchinson*, 1 D. P. C. 493.

3. A transfer made under the apprehension of arrest cannot be set aside as *voluntary* under the Insolvent Act.—*Corbould v. Broadhurst*, 1 M. & Rob. 189.

And see LANDLORD and TENANT, 3.

#### INSURANCE.

(*Description of property.*) The goods were described in the policy as being in the dwelling-house of the plaintiff; it appeared that the plaintiff occupied but one room as a lodger. Held sufficiently described within the meaning of a condition that “houses, buildings, or other places, in which &c. shall be truly and accurately described.”—*Friedlander v. The London Assurance Company*, 1 M. & Rob. 171.

## INTERPLEADER ACT.

1. The Interpleader Act, 1 & 2 Will. 4, c. 58, s. 6, does not apply to claims set up in consequence of proceedings in equity.—*Sturgess v. Claude*, 1 D. P. C. 505.
2. (*Costs.*) Where an application is made by the sheriff under this act, and no blame attaches to any party, each will pay his own costs.—*Morland v. Chitty*, 1 D. P. C. 520.
3. (*Sheriff.*) In the case of a dispute between two execution creditors for precedence, the Court held that the sheriff was not entitled to relief under the Interpleader Act.—*Day v. Waldock*, 1 D. P. C. 523.
4. (*Costs.*) Where, on the application of the sheriff, an issue is directed to try adverse claims, the Court, subsequently to the trial, may order the plaintiff his costs.—*Seward v. Williams*, 1 D. P. C. 528.
5. (*Sheriff.*) Where the sheriff suffered an action to be brought against him, and kept possession of the goods for several months, the Court refused to relieve him.—*Devereux v. John*, 1 D. P. C. 548.

## JOINT STOCK COMPANY.

1. (*Parties in action against.*) The declaration described the contract as made by the directors of the West India Dock Company, and concluded that the plaintiffs brought their action against the treasurer according to the statute. Held, that the contract, as stated, was in legal effect the contract of the company, and that the action was well brought, though the proof was that the company were the real contractors.—*Soulby v. Smith*, 3 B. & Ad. 929.
2. (*Action against treasurer.*) Where an act incorporating a company directs that actions for claims on the company shall be brought against the treasurer, but that his effects shall not be taken in execution, a mandamus lies to enforce payment by the directors &c. of the company. (6 Bing. 676.)—*The King v. St. Katharine Dock Company*, 1 N. & M. 121.

## JUDGE.

1. (*At chambers, power of.*) On an affidavit that all the allegations in a plea were false, a judge at chambers made an order "that the plaintiff should be at liberty to sign judgment, notwithstanding the plea—the plea appearing to be defective." The Court set aside the order, on the ground, apparently, that the judge had no power to make it.—*Miley v. Walls*, 1 D. P. C. 648.
2. (*Disobedience to order of.*) An attachment will not lie for disobeying a judge's order, unless made a rule of Court.—*Baker v. Rye*, 1 D. P. C. 689.
3. An order made under a misapprehension, and after an erroneous opinion given by a judge, held not binding.—*Whalley v. Barnet*, 1 D. P. C. 607.

## JUDGMENT.

- (*Of county court.*) The judgment of a county court is not conclusive; and though a motion made there to set it aside for irregularity be dismissed, the existence of the facts necessary to make it regular is still a question for a jury. (1 Dougl. 1.)—*Thompson v. Blackhurst*, 1 N. & M. 266.

## KING'S BENCH PRISON.

An attorney has a right to be admitted to the interior of the prison when sent for by, or when he has occasion to visit a client confined there in his professional capacity; but the Court will not make a general order on the marshal to admit him at all times to visit his clients.—*In re Jones*, 1 N. & M. 128.

## LANDLORD AND TENANT.

1. (*Waiver of right of re-entry.*) A right of re-entry, accruing by the tenant's omission to repair within three months after notice, is not waived by the acceptance of rent falling due during the three months. Such right is only suspended, not waived, by an agreement to allow the tenant further time to repair.—*Doe d. Rankin v. Brindley*, 1 N. & M. 1.
2. (*Liability of lessee's executors.*) A lessee's executors are chargeable personally, as assigns, for such part of the rent reserved as the occupation of the premises is worth; but unless they enter, they can be sued in the detinet only for any excess of the rent reserved above the value of the occupation. (5 Co. Rep. 316; Pollexfen, 132; 1 Lev. 127; 1 Sid. 226; 3 Salk. 317; 1 Wms. Saund. 111, 390.)—*Rubery v. Stevens*, 1 N. & M. 182.
3. (*Right of landlord where tenant becomes insolvent after distress.*) A landlord distrains for rent; the tenant is afterwards arrested, goes to prison, and petitions the Insolvent Debtors' Court, before the goods are sold. The landlord is entitled to the whole rent due, not merely to a year's. (7 Geo. 4, c. 57, s. 31.)—*Wray v. Earl of Egremont*, 1 N. & M. 188.

And see DISTRESS, 3.

## LAND-TAX.

(*Redemption of.*) Under 42 Geo. 3, c. 116, giving corporations power to raise money for the redemption of land-tax, not merely the fee simple or reversionary interest, but the rents, services and other profits must be disposed of; and the sale is not valid or complete until the Commissioners have given the assent required. Neither has the ecclesiastical corporation (in the present case a prebendary) any right to distrain until after the precise quantity of land, and the portion of the reserved rent to be sold, have been ascertained by the Commissioners.—*Warner v. Potchett*, 3 B. & Ad. 921.

## LARCENY.

A party employed to carry hay to a consignee took away one of the trusses, but did not break it up: Held, no larceny.—*Rex v. Pratley*, 5 C. & P. 533.

## LIBEL.

It is not a libel to call a man the "man Friday" of another, without an innuendo to apply the term as implying degradation. Neither is it libellous to accuse a man of gambling (not stated to be illegal gambling) and not appearing on the ground to fight a duel at the time fixed by his second.—*Forbes v. King*, 1 D. P. C. 672.<sup>1</sup>

<sup>1</sup> In reporting such cases as this, Mr. Dowling appears to us to be infringing on the ground occupied by the regular reporters.

**LIEN.**

1. (*Lost by taking security.*) A vendor who takes a promissory note in payment, and negotiates it, loses his lien, nor is it revived by the dishonour of the note, outstanding in the hands of an indorsee. (5 T. R. 313; 3 B. & Ald. 497; 6 B. & C. 373.)—*Bunney v. Poyntz*, 1 N. & M. 229.
2. If a person, having a lien, abuses it by pledging the goods, the owner's right to the possession revives, and he may maintain trover.—*Scott v. Newington*, 1 M. & Rob. 252.

**LIMITATIONS, STATUTE OF.**

Tenant for life, with power of appointment by will attested by three witnesses, appointed the lands to A. for life, with remainder to B. in fee. The appointment to A. became void by his being a witness to the will. On testator's death, A.'s husband entered and held the land till his death, which was three years after A.'s death: Held, that the Statute of Limitations did not begin to run against B. till A.'s death.—*Doe d. Allen v. Blakeway*, 5 C. & P. 563.

**LORDS' ACT.**

Under the compulsory clauses of the Lords' Act (32 Geo. 2, c. 28,) a prisoner who refuses to claim his sixty days for the purpose of preparing his schedule, is to have them allowed by the court.—*Pierce v. Davidson*, 1 D. P. C. 496.

**MAGISTRATE.**

1. (*Duty of, in suppressing riot.*) A magistrate is bound to do all that he knows to be in his power to suppress a riot, that could reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, in the circumstances. Mere honesty of intention forms no excuse. A magistrate is not bound to marshal or head the constables or the military, nor to accompany the latter; it is sufficient if he gives them proper authority to act; nor is he chargeable with neglect of duty for not calling out the *posse comitatus*, provided he has given the inhabitants timely notice of the impending riot. It ought to be proved that an information on oath had been submitted to the magistrate, to make him responsible for not having sworn in special constables pursuant to 1 & 2 Wm. 4, c. 41.—*The King v. Pinney*, 3 B. & Ad. 947.
2. A magistrate is not at liberty to detain a known person to answer a charge merely intimated as about to be made.—*Rex v. Birnie*, 1 M. & Rob. 160.

**MANDAMUS.**

1. It is no ground for refusing a mandamus to admit a party to an office into which he has been elected, that to a similar mandamus granted in respect of a former election of the same party, the return showed an excuse valid in point of law for not admitting him.—*The King v. The Mayor and Aldermen of London*, 1 N. & M. 285.
2. A local act declared that the vestry accounts of the parish should be audited by certain auditors to be elected annually. The court refused to grant a *mandamus* to compel the vestry clerk, whose duty it was to call

together the auditors, to call a meeting of the old auditors to audit the accounts of the preceding year, after the election of new auditors.—*In re St. Giles and St. George's Parishes*, 1 D. P. C. 540.

And see PRACTICE, 3.

#### NEW TRIAL.

(*Discharging rule for.*) A motion was made for a rule to show cause why a rule for a new trial should not be discharged. The court expressed themselves against the motion upon principle, but said that at all events a term's notice must be given.—Held also that an order for changing the attorney was not a step in the cause.—*Deacon v. Fuller*, 1 D. P. C. 675.

And see COVENANT, 2; PRACTICE, 4, 40.

#### NOTICE TO PRODUCE.

1. Notice to produce must be served before the commission day of the assizes. The party served did not reside in the town.—*Twist v. Johnson*, 1 M. & Rob. 259.
2. Notice to produce served on a prisoner two days before the trial, but during the assizes, was held insufficient; the judge saying that the rule held *a fortiori* in a criminal case.—*Rex v. Ellicombe*, 1 M. & Rob. 260; 5 C. & P. 522.

#### OVERSEERS.

1. (*Notice to justices of application for certiorari.*) A notice to justices of an application for a *certiorari* to be made on behalf of the churchwardens and overseers, given in pursuance of the 13 Geo. 2, c. 18, s. 5, was held insufficient on the ground of its being signed by one of the churchwardens only.—*The King v. Justices of Cambridgeshire*, 3 B. & Ad. 887.
2. (*For separate townships.*) The parish of H. consists of two townships and ten villis in the county of S., and three townships in the county of W. Two churchwardens have always been appointed for the whole parish, but the townships in W. have always had two overseers each, and the justices of S. have annually appointed four overseers for the part of the parish lying in S. The respective overseers, with one of the churchwardens, have always made separate rates for each division, and relieved the poor separately. Under these circumstances the court granted a *mandamus* to the justices of S. to appoint two overseers for one of the townships in the county of S. (13 & 14 Car. 2, c. 12: 1 T. R. 374; Sir T. Raymond, 476.)—*The King v. Justices of Salop*, 3 B. & Ad. 910.
3. (*Mutual liability.*) P. and W. were appointed overseers; the custom was for the overseers to divide the duty by half-years, but when W. had done his half-year's duty, he offered to do P.'s duty also, which was consented to and done. The account was rendered by W., making no distinction as to half-years. P. subsequently signed the account to the extent of expressing his belief that it was correct, but refused, when called upon, to verify it on oath: Held, that P. was not liable for money received by W.; or at any rate that a *mandamus* directing a distress could not issue without an account showing how much was due in respect of the last half-year.—*The King v. Justices of Essex*, 3 B. & Ad. 941.

4. (*Liability for not accounting.*) An overseer who has acted only by signing the rates, is bound to deliver in an account of the sums due from the rate-payers. Under 17 Geo. 2, c. 38, the justices have a discretion whether or not they will commit an overseer for not accounting.—*The King v. Justices of Norfolk*, 1 N. & M. 67.
5. (*When entitled to costs.*) A rule nisi for a mandamus to justices to hear an appeal, was discharged “with costs to be paid to the said defendants, the justices, or their attorney.” The justices had not appeared by counsel, but the officers of the parish, in whose favour the appeal had been given, had so appeared: Held, that the parish officers were not entitled to their costs.—*Rex v. Justices of Staffordshire*, 1 D. P. C. 507.

## PARTIES TO ACTION.

1. One L. S. effected a policy on her own life with a Life Insurance Company. The policy was by deed, and executed by three trustees in the name of the company. The policy was afterwards transferred to the defendant. L. S. died, and the money due on the policy was paid to the defendant by a cheque drawn by the trustees upon their bankers, and he gave a receipt as of money received from them: Held, that the policy being afterwards discovered to be void, an action to recover back the money was maintainable in the names of the three trustees.—*Lefevre v. Boyle*, 3 B. & Ad. 877.
2. Where goods are sent merely for approval, the action against the carrier must be brought in the name of the consignor.—*Swain v. Shepherd*, 1 M. & Rob. 223.

## PARTNERSHIP.

(*Effect of dissolution.*) Where a partnership is not created for any specific time, it may be dissolved at any time, and no publication of the dissolution is necessary to exempt a retiring *dormant* partner from liability as to future transactions. (4 Camp. 215; 16 Ves. jun. 49.)—*Heath v. Sansom*, 1 N. & M. 104.

## PATENT.

Where the improvement consisted principally in the adoption of modes already known, and the only new part was not the object of the invention, held that the patent was not maintainable.—*Saunders v. Aston*, 3 B. & Ad. 881.

## PAUPER.

1. (*Prosecuting in formá pauperis.*) There must be special circumstances to entitle a party to prosecute *in formá pauperis*.—*Rex v. Wilkins*, 1 D. P. C. 536.
2. (*Pleading in formá pauperis.*) A defendant in an indictment for perjury was allowed to plead *in formá pauperis*, on the usual affidavit of poverty. *Rex v. Page*, 1 D. P. C. 507.

## PAWNBROKERS' ACT.

The power of imprisonment given by 39 & 40 Geo. 3, c. 99, s. 14, in cases



of wilful detention, does not extend to the cases of embezzlement, loss, or damage, provided for by s. 24.

*Semble*, that where goods pledged have been destroyed by fire without the pawnbroker's negligence or default, he is not liable to make compensation.—*Rex v. Cording*, 1 N. & M. 35.

#### PAYMENT INTO COURT.

(*Effect of.*) In *indebitatus* assumpsit for work and labour done in one contract, the defendant by paying money into court precludes himself from afterwards objecting that another person should have been joined as plaintiff.—*Walker v. Rawson*, 1 M. & Rob. 250.

And see PRACTICE, 2.

#### PEER.

Judgment of *respondeat ouster* had been given on a plea of peerage; the cause went on to trial, and the plaintiff had a verdict. A *ca. sa.* being issued, the court refused to set it aside on an affidavit that the defendant was a Scotch peer.—*Digby v. Alexander*, 1 D. P. C. 713.

#### PIRACY.

If A. use B.'s mark in order to give to goods manufactured by A. the appearance of being B.'s manufacture, although A.'s articles be equally good, and no loss is shown to have resulted to B., he may maintain an action against A.—*Blofeld v. Payne*, 1 N. & M. 353.

#### PLEADING.

1. (*Promise to pay.*) A count in assumpsit must distinctly allege to whom the promise to pay was made.—*Price v. Easton*, 1 N. & M. 303.
2. (*Joinder of counts. Averment.*) A count charging defendant with having preferred a charge of felony against plaintiff before a magistrate, and having entered his house under a warrant to search for stolen goods, obtained on such charge, may be joined with counts in tort. And by Taunton and Patteson Js., diss. Littledale J., an allegation that defendant entered *to search for the said goods*, is a sufficient allegation that he entered under the warrant. (2 M. & S. 77; 2 Chit. Rep. 304; 1 Ld. Raym. 272.)—*Hensworth v. Fowkes*, 1 N. & M. 321.
3. (*Agreement of declaration with process.*) The summons (since the Uniformity of Process Act) was to answer the plaintiff in *trespass on the case*; the declaration was in *assumpsit*: Held irregular.—*King v. Skeffington*, 1 D. P. C. 686.
4. (*When nil debet not allowed.*) To debt on a French judgment, *nil debet* was pleaded along with several other special pleas. The court ordered that plea to be struck out, it appearing that the real question might be tried on the other issues.—*Aliven v. Furnival*, 1 D. P. C. 690.
5. A contract to carry from London to Bath is supported by evidence of a contract to carry from Westminster to Bath; London being to be understood in its enlarged sense.—*Beckford v. Crutwell*, 1 M. & Rob. 187.
6. (*Verdict on count for interest.*) When money was first had and received, and there was subsequently an agreement to pay interest; the money and

interest may be recovered on the counts for money had and received and for interest, and the plaintiff need not declare specially.—*Hicks v. Mareco*, 5 C. & P. 498.

**POOR.** See **OVERSEERS**.—**VESTRY**.

#### **POOR RATE.**

1. (*Distress for.*) An application to refund money obtained by a wrongful distress for poor rates, under 41 Geo. 3, c. 83, s. 8, must be made at the same sessions at which the rate is amended.—*The King v. Justices of York*, 1 N. & M. 108.
2. (*Liability of mines.*) The owner or occupier of a *manganese* mine is not rateable to the poor.—*The King v. Tremayne*, 1 N. & M. 194.

And see **SESSIONS**, 1.

#### **PRACTICE.**

1. (*Where two actions for same cause.*) The plaintiff in an action to recover damages (under 7 & 8 Geo. 4, c. 31,) for an injury done by rioters, having brought a second action for the same cause in the Exchequer, the Court of K. B. refused to allow the action in their Court to proceed further, unless the plaintiff abandoned that in the Exchequer.—*Miles v. Inhabitants of Bristol*, 3 B. & Ad. 945.
2. (*Payment of money into Court.*) The defendant pleaded a tender, and obtained an order to pay money into Court generally: Held, that payment under this order was an admission of the cause of action stated in the declaration, and entitled the plaintiff to a verdict accordingly.—*Bulwer v. Horne*, 1 N. & M. 117.
3. (*Mandamus*) A rule for quashing a return to a mandamus need not go into the crown paper. In showing cause, the defendant may object that the writ issued improperly.—*The King v. St. Katharine Dock Company*, 1 N. & M. 121.
4. (*New trial in action on bill of exchange.*) After verdict for defendant on the ground that the bill was given for a gambling debt, the Court will not grant a new trial on affidavits negating that defence, unless there has been surprise on the trial.—*Aliken v. Howell*, 1 N. & M. 191.
5. (*Changing venue in case of felony.*) The Court refused to allow the defendant, in an indictment for felony, to enter a suggestion for changing the venue, on the ground of a prejudice existing in the county.—*The King v. Penpraze*, 1 N. & M. 312.

[The defendants in this case were afterwards acquitted.]

6. (*Amending record under Lord Tenterden's Act.*) A record may be amended during the trial, under 9 Geo. 4, c. 15, by correcting a variance between a written contract and the statement of the contract in the declaration, although it do not appear by the record that the contract was in writing. (8 Bing. 224.)—*Lamey v. Bishop*, 1 N. & M. 332.
7. (*Motion to set aside warrant of attorney.*) A rule to set aside a warrant of attorney as given for an illegal consideration, is in the nature of an

- application to set aside proceedings for irregularity, and if discharged will be discharged with costs.—*Colebrooke v. Layton*, 1 N. & M. 374.
8. (*Plea in abatement.*) A plea in abatement, founded on an affidavit sworn before the delivery of the declaration, is bad; (1 Tyrw. 260,) but where the declaration (in a country cause) was delivered after post hours on a Saturday night, so that the plea would not otherwise have been in time, the Court set aside the interlocutory judgment signed for want of a plea, on payment of costs and affidavit of merits.—*Johnson v. Popplewell*, 2 Tyrw. 715.
  9. (*Affidavit of merits.*) An affidavit of merits, sworn by the agent of the country attorney on information and belief, is sufficient, if the facts are uncontradicted.—*Johnson v. Popplewell*, 2 Tyrw. 715.
  10. (*Ejectment.*) If the notice to appear in ejectment be served in one term, judgment may be moved against the casual ejector in the next term, being issuable.—*Doe v. Roe*, 2 Tyrw. 724.
  11. (*Ejectment.*) One rule for judgment against the casual ejector, though several tenants in possession have been served with ejectment.—*Doe v. Roe*, 2 Tyrw. 724.
  12. (*Notice of trial.*) Two days' clear notice, exclusive of an intervening Sunday, must be given.—*Grojean v. Manning*, 2 Tyrw. 725.
  13. (*Amendment.*) Affidavit in support of motion for costs of the day for not proceeding to trial, allowed to be amended without costs.—*Larken v. Bovill*, 2 Tyrw. 746.
  14. (*Rejoining gratis, what.*) By the terms of "rejoining gratis" is meant not only to dispense with the rule to rejoin, but also with the time given by it; so that defendant must rejoin within twenty-four hours of demand of rejoinder.—*Clarke v. Adams*, 2 Tyrw. 755.
  15. (*Where personal service of rule waived.*) After a rule has been enlarged by consent, it cannot be objected that there was no personal service of the rule. A direction in an award (not made under an order of *nisi prius*), that a verdict shall be entered for a given sum, is tantamount to a direction that the sum shall be paid by the defendant to the plaintiff.—*Cartwright v. Blackworth*, 1 D. P. C. 489.
  16. (*Affidavit.*) An affidavit in support of a motion to enter up judgment on an old warrant of attorney, stated that the defendant was alive, and that the deponent saw and conversed with him *about* six days since: Held insufficient.—*Willis v. James*, 1 D. P. C. 498.
  17. (*Entitling affidavits.*) Affidavits in support of a rule to set aside *a. ca. sa.* on the ground of misnomer, should be entitled of the right name.—*Thorpe v. Hook*, 1 D. P. C. 494.
  18. (*Amendment of sci. fa.*) *Scire fa.* to revive a judgment more than a year old. The judgment and all the prior proceedings were against *John Hook*. The two writs of *sci. fa.*, the award of execution, the *ca. sa.*, and the warrant, were against *James Hook*. The Court allowed all the last-

mentioned proceedings to be amended by substituting *John* for *James*, after the *ca. sa.* had been executed and returned.—*Thorpe v. Hook*, 1 D. P. C. 501.

19. (*Service of rule.*) A rule to compute was served on a hair-dresser, to whom a board stuck up on the defendant's chambers referred, and who said he was in the habit of receiving letters for him: Held insufficient.—*Stout v. Smith*, 1 D. P. C. 506.

20. (*Filing affidavits.*) An affidavit in support of a motion must be filed whether the motion be successful or not.—*John v. Mills*, 1 D. P. C. 510.

21. (*Teste of writ.*) A *ca. sa.* was tested in the name of a Chief Justice who was dead when the writ issued, but alive at the beginning of that term: Held sufficient.—*Sutton v. Lard Cardross*, 1 D. P. C. 511.

22. (*Summons on sci. fa.*) A *sci. fa.* was returnable on the 28th April, and various attempts had been made to summon the defendant: Held that an application in November to be allowed to sign judgment was too late, and that the defendant must be summoned again.—*Wood v. Mosely*, 1 D. P. C. 513.

23. (*Distringas.*) To procure a *distringas* under 2 Wm. 4, c. 39, there must have been three attempts to serve the writ of summons, and the affidavit should state that the deponent believes that the defendant keeps out of the way to avoid being served, or that a copy of the summons was left for him.—*Anon.* 1 D. P. C. 513.

24. (*Sci. fa.*) The rule 1 H. T. 2 Wm. 4, s. 81, as to *sci. fa.*, applies as well to proceedings against the principal as against the bail.—*Jackson v. Elam*, 1 D. P. C. 515.

25. (*Continuances.*) The Uniformity of Process Act does not affect the continuance of actions commenced before it came into operation.—*Storr v. Bowles*, 1 D. P. C. 516.

26. (*Summons.*) The name of the plaintiff was not stated in the summons as the person who would enter an appearance for the defendant if he did not comply with the exigency of the process: Held an irregularity.—*Smith v. Crump*, 1 D. P. C. 519.

27. (*Service of declaration in ejectment.*) The person serving a declaration in ejectment did not read or explain it, but the tenant read it and said he understood it: Held sufficient.—*Doe d. Jones v. Roe*, 1 D. P. C. 518.

28. (*Court will not interfere in matters of trust.*) Where a party gave another a warrant of attorney without consideration, with a view of protecting his goods against an execution, and the latter sued out execution, the Court refused to interfere, on the ground that the matter must be looked upon as one between trustee and *cestui que trust*.—*Dukes v. Saunders*, 1 D. P. C. 522.

29. (*Setting aside proceedings.*) A rule nisi for setting aside proceedings for irregularity cannot be granted with a stay of proceedings in the meantime, unless notice have been given to the other side.—*Fortescue v. Jones*, 1 D. P. C. 524.

30. (*Where plaintiff may appear for defendant.*) Where the defendant's goods have been distrained under 2 & 3 W. 4, c. 39, s. 3, and the defendant does not appear, the plaintiff may enter an appearance for him without the leave of the court.—*Johnson v. Smealey*, 1 D. P. C. 526.
31. Indictment for non-repair of a road. After one of the inhabitants had removed it by *certiorari* and entered into the usual recognizances for costs, held that the others could not be admitted to plead guilty.—*Rex v. Inhabitants of Luxborough*, 1 D. P. C. 527.
32. (*Costs of bad plea.*) A verdict was found for the plaintiff subject to a special case. A nonsuit was directed to be entered, but one of the defendant's pleas, a plea of set-off, was held bad on the ground that the claim and set-off were not in the same right: Held, that the defendant was not entitled to the costs of his witnesses in support of that plea.—*Cartwright v. Cox*, 1 D. P. C. 529.
33. (*Attachment.*) An order of reference was made a rule of court in the term after the making of the award. A few days after the term the defendant died: Held, that the suit having thereby abated, the court could not grant an attachment for the nonpayment of the costs against the personal representatives of the defendant.—*The King v. Maffey*, 1 D. P. C. 538.
34. (*What is taking down to trial.*) The plaintiff twice gave notice that the cause would be taken as undefended on the undefended cause day, and on each occasion, on counsel's stating that it was defended, it was directed to keep its place in the list: Held, that this was not a taking down to trial, sufficient to prevent the defendant from obtaining judgment as in case of a nonsuit.—*Edrupp v. Davies*, 1 D. P. C. 552.
35. (*Impar lance.*) The writ and appearance were of Hilary term, the declaration of Trinity term:—Held that the defendant was entitled to an impar lance.—*Whalley v. Barnet*, 1 D. P. C. 607.
36. (*Where demurrer a nullity.*) Where the party is under terms to plead issuably, a special demurrer may be treated as a nullity: otherwise not, however trivial.—*Nanney v. Kenrick*, 1 D. P. C. 609.
37. (*Entering up judgment.*) Motion to enter up judgment on a *scire facias*: The last writ was returnable in 1825, and a rule for appearances had been entered every term: Held that notice must also be given to the bail.—*Kennedy v. Lord Oxford*, 1 D. P. C. 613.
38. (*Amendment by judge at Nisi Prius.*) The declaration stated a bill of exchange as payable to S., indorsed by S. to A., and by A. to the plaintiff. The bill was in fact payable to A. The judge at *Nisi Prius* (under 9 G. 4, c. 15) ordered an amendment, and the court above held that he did right; expressing at the same time a strong doubt whether his decision on such a point was subject to be reviewed by the court above.—*Parker v. Ade*, 1 D. P. C. 643.
39. (*Mode of proof in case of set-off.*) The plaintiff need only prove the balance in the first instance; if the defendant proves a set-off to a larger

amount, the plaintiff may then prove the other items of his demand.—*Williams v. Davis*, 1 D. P. C. 647.

40. (*New trial.*) An order for an immaterial amendment was obtained by the plaintiff. The defendant took out a summons for an order to rescind the first order, which was rescinded. Between the summons and the last order, the cause was tried. The court refused a new trial without an affidavit of merits, or that the defendant did not know that the cause was coming on.—*Clark v. Manns*, 1 D. P. C. 656.
41. (*Amendment of declaration.*) Action for disturbance of a right of ferry. At the assizes, an application was made to the judge to amend by adding new counts, which was refused, upon which the record was withdrawn. The Court subsequently allowed the plaintiff to amend by adding new counts, varying the *termini* and the description of the persons liable to toll.—*Morris v. Evans*, 1 D. P. C. 657.<sup>1</sup>
42. (*Where copy of affidavit necessary.*) Cause cannot be shown without an office copy of the affidavit on which the rule *nisi* is obtained.—*Brown v. Probert*, 1 D. P. C. 659.
43. (*Time for appearing.*) The plaintiff may enter an appearance for the defendant at any time within twelve months in the Exchequer. The process was a *quo minus*.—*Cook v. Allen*, 1 D. P. C. 676.
44. (*Setting aside proceedings.*) A judge at chambers having in an action of *assumpsit* ordered a sham demurrer to be set aside and judgment signed, under which final judgment was signed without interlocutory judgment, and execution issued, the court set aside the order, it being agreed that the debt and costs up to the time of the declaration should be retained.—*Forster v. Burton*, 1 D. P. C. 683.
45. (*Venue.*) The court refused to change the venue in a life-insurance cause from London to Somersetshire, on an affidavit that all the witnesses resided there, except on terms dictated by the court.—*Bowring v. Bignold*, 1 D. P. C. 685.
46. (*Affidavit in support of plea in abatement—Costs.*) An affidavit in support of a plea in abatement must strictly agree with the plea. Thus, where the name was *Mary Anne* in one and *Ann Mary* in the other, the variance was held fatal. No costs are allowed on setting aside a plea in abatement for irregularity.—*Poole v. Pembrey*, 1 D. P. C. 693.
47. (*Distringas.*) A *distringas* may issue to compel an appearance, or to proceed to outlawry, but it cannot be in the alternative.—*Fraser v. Case*, 1 D. P. C. 725.
48. (*Right to begin on trial.*) In trespass, with *lib. ten.*, and other pleas claiming a right of way, but no general issue, pleaded, defendant is entitled to begin.—*Pearson v. Coles*, 1 M. & Rob. 206.
49. (*Right to begin on trial.*) In libel, where there is no general issue, but several pleas of justification as to part, and judgment suffered as to the rest, the plaintiff is entitled to begin.—*Wood v. Pringle*, 1 M. & Rob. 277.

<sup>1</sup> The reporter is in error in this case: the amendment was at first allowed only on terms, and was in the end refused, and a new action was brought.

50. (*Sittings.*) It seems that no *nisi prius* sittings can be held by the King's Bench during a vacancy of the chief justiceship.—1 M. & Rob. 226.
51. (*Amendment.*) In ejectment, the declaration cannot be amended by enlarging the term, after the cause is called on.—*Doe d. Manning v. Hay*, 1 M. & Rob. 243.

And see BAIL; PROCESS; PRISONER; EVIDENCE, 1, 3, 6, 15.

#### PRINCIPAL AND FACTOR.

By custom in the Corn Market, the ordinary credit being two months, the buyer may pay the factor on discount within that time, either for his own or the factor's accommodation. Where therefore a factor stopped payment after receiving the price, and within the two months, it was held that the seller must look to the factor, and could not sue the buyer.—*Heisch v. Carrington*, 5 C. & P. 471.

#### PRISONER.

1. (*Discharge.*) In applying to discharge a prisoner under 48 G. 3, c. 123, the name of the cause in which the prisoner is in execution must be correctly stated in the notice.—*Kelly v. Dickinson*, 1 D. P. C. 537.
2. (*Discharge.*) The rule to show cause why a prisoner should not be discharged under 48 G. 3, c. 123, must be served on the plaintiff in the suit; service on the attorney is not sufficient.—*Kelly v. Dickinson*, 1 D. P. C. 546.
3. But where the plaintiff's residence could not be found, service on the attorney was held sufficient.—*Wilson v. Mokler*, 1 D. P. C. 549.
4. (*Discharge.*) The court have no power to refuse a prisoner, who has been imprisoned twelve months for a debt not exceeding 20*l.*, his discharge. The words in the act *to the satisfaction of the court* refer only to the period of imprisonment.—*Stacey v. Fieldsend*, 1 D. P. C. 700.
5. (*When brought up to be charged with declaration.*) Since the Uniformity of Process Act, the court granted a *habeas corpus ad res.* to bring up a prisoner confined on a criminal charge to be charged with a declaration.—*Williams v. Smith*, 1 D. P. C. 703.

#### PROCESS.

1. (*Indorsement of attorney's name.*) Service of bailable process was set aside for irregularity, the name of the attorney immediately retained by the plaintiff not being indorsed as required by 2 Geo. 2, c. 23, s. 22.—*Sheppard v. Shum*, 2 Tyrw. 742.
2. (*Form—setting aside service of.*) It is not sufficient under 2 Wm. 4, c. 39, s. 12, directing that every writ shall bear date on the day on which it issues, that there is a date indorsed.  
Where an application is made to set aside the service only, it is not sufficient to show an objection to the writ.—*Anon.* 1 D. P. C. 654.
3. (*Issuing distringas.*) It is discretionary in the judge whether a writ of *distringas* to compel an appearance shall issue, and the Court will not set it aside merely because it was not sworn that a copy of the summons was left.—*Smith v. Macdonald*, 1 D. P. C. 688.



**PROMISSORY NOTE.**

1. (*Given to compromise misdemeanor, valid.*) A promissory note given by a defendant after a conviction for misdemeanor and before sentence, in pursuance of a recommendation from the Court to compromise, is valid, although it include the costs of the prosecution, and although the terms are not communicated to the Court. (11 East, 46.)—*Kirk v. Strickwood*, 1 N. & M. 275.
2. The defendant had bought goods of the plaintiff, which he sold immediately to one P., receiving P.'s note in payment. This note he paid over, without indorsing it, to the plaintiff: Held, that the plaintiff was not bound to prove any demand of payment of the note in order to recover for the goods against the defendant.—*Goodwin v. Coates*, 1 M. & Rob. 221.
3. A promissory note purported to be payable on demand, but was given as a security for the payment of money by instalments: Held, that after suing and recovering upon the note upon the non-payment of one instalment, the plaintiff was precluded from bringing another action on a second default.—*Siddall v. Rawcliffe*, 1 M. & Rob. 263.

**PUBLIC OFFICER.**

An affidavit before a commissioner is admissible without proof of the commission, as a person acting as a public officer must be taken to have authority as such.—*Rex v. Howard*, 1 M. & Rob. 187.

**PUBLIC HOUSE.**

(*License.*) The licensing magistrates of the Holborn division licensed the opening of a new public house within seventeen yards of a public house that had been licensed for sixteen years, and had been occupied during the whole term by the same person: Held, that the landlord of the old established house was not a party aggrieved within 9 Geo. 4, c. 61, s. 27, and consequently not entitled to appeal.—*The King v. Justices of Middlesex*, 3 B. & Ad. 938.

**REPLEVIN.**

Defendant avowed for rent payable yearly, for rent payable half-yearly, and for rent payable quarterly; to each of these avowries plaintiff pleaded *non tenuit* and *riens in arrear*. A holding at a rent payable half yearly was proved, and the jury were directed to find for the plaintiff on the first and fifth issues, for the defendant on the third and fourth, and were discharged from a verdict on the second and sixth.—*Willson v. Davenport*, 5 C. & P. 531.

**REVERSIONER.** See ACTION ON THE CASE, 1.

**ROBBERY.**

Obtaining money from the wife under the threat of accusing her husband of an unnatural offence, does not amount to a robbery, but is, it seems, a misdemeanour.—*Rex v. Edward*, 1 M. & Rob. 257.

## SALE.

The conditions of sale provided, that if any mistake should be made in the description of the premises, the contract should stand good, but compensation should be made: Held, that any misdescription, originating in error, was within the terms of the proviso, as the purchaser might have avoided the effects of the mistake by inspecting the property.—*Wright v. Wilson*, 1 M. & Rob. 207.

SCIRE FACIAS. See PRACTICE, 18, 22, 24, 37.

## SESSIONS.

1. (*Practice in appeals.*) The respiting of an appeal against a poor-rate, at the instance of the respondents, admits the notice of appeal.—*The King v. Justices of Hertfordshire*, 1 N. & M. 331.
2. (*Practice in appeals.*) Where an appeal is entered, and the appellant does not appear, the sessions may notwithstanding hear the appeal.—*The King v. Justices of Essex*, 1 D. P. C. 539.

## SETTLEMENT.

1. (*Apprenticeship. Notice.*) A child is bound apprentice by A. parish to a master resident in B. parish, in *the same* county. Notice must be given to the overseers of B. according to 56 Geo. 3, c. 139, s. 2. (3 B. & C. 75.)—*The King v. Inhabitants of Threlkeld*, 1 N. & M. 14.
2. (*Hiring and service. Exceptive hiring.*) Pauper contracted to become the hired servant of A. for five years; to do such work as belonged to the finishing of cloth, and to take any part of work A. should think proper.—A. promised to pay pauper 10s. a week for two years, 11s. for the third, 12s. for the fourth, and 13s. for the fifth: the hours of working to be from six in the morning to seven in the evening, and to be paid for all over time and deducted for all short, either in sickness or in health: Held, (Taunton J. dissentient.) that this was not an exceptive hiring. (Rex v. Byker, 2 B. & C. 114; Rex v. Birmingham, 9 B. & C. 925; and Rex v. Frome Sellwood, 1 B. & Adol. 207, were relied upon on the other side: the judges admitted the great difficulty of distinguishing them.)—*The King v. Inhabitants of Ossett-cum-Gaithorpe*, 1 N. & M. 21.
3. (*Renting.*) Land rented and occupied from Lady-day to Lady-day, and a house rented and occupied from May-day to May-day, under a joint demise at 10*l.*, confer a settlement under 6 Geo. 4, c. 57, s. 2.—*The King v. Inhabitants of Ormesby*, 1 N. & M. 27.
4. (*Renting. What a separate building.*) A shop held jointly with a house, with which it has an internal communication, is not a separate and distinct building within 6 Geo. 4, c. 57.—*The King v. Inhabitants of Rickinghall Superior*, 1 N. & M. 47.
5. (*By paying rates.*) A. occupied, from 1815 to 1830, at the rent of 6*l.*, three separate rooms, part of a dwelling-house of above 10*l.* a year value, under an agreement by which he paid the rates and taxes for the whole house: Held, that he thereby gained a settlement. (2 B. & C.

122; 1 B. & Adol. 75.)—*The King v. Inhabitants of Penryn*, 1 N. & M. 74.

6. (*By purchase.*) The consideration of 30*l.* required by the 9 Geo. 1, c. 7, s. 5, means a money consideration only. (Cald. 209.)—*The King v. Inhabitants of Lyddlinch*, 1 N. & M. 33.

7. (*By serving office.*) Service of the office of pinder in 1825, without any former appointment of the kind in the parish, confers no settlement.—*The King v. Inhabitants of Clirby*, 1 N. & M. 118.

8. (*Of illegitimate child. Fraudulent removal.*) A fraudulent removal of a pregnant woman out of one parish into another, or into an extra-parochial place, to prevent her bastard child from becoming settled in the former, does not prevent the child from gaining a settlement where born, unless the fraud were practised by the parish officers. Nor then, as it seems, unless the mother's settlement were in the parish from which she was removed. (3 Salk. 66; 2 B. & C. 889.)—*The King v. Inhabitants of Mattersey*, 1 N. & M. 49.

9. (*Hiring and service.*) A servant hired for a year was during the service convicted of a misdemeanor, fined, and imprisoned for non-payment of the fine. The mistress advised her going to prison, told her to return when the imprisonment was over, and received her back accordingly, and at the end of the year paid her her whole wages: Held, that a settlement was gained. (2 M. & S. 329; 2 B. & C. 739.)—*The King v. Inhabitants of Coningsby*, 1 N. & M. 199.

#### SHERIFF.

1. (*Action against, for refusing bail.*) It is no defence to an action against the sheriff for refusing to take bail, that the party arrested did not tender a bail bond: the sheriff is to prepare the bond.—*Milne v. Wood*, 5 C. & P. 587.

2. (*Liability for an escape.*) In the case of an escape on *mesne* process, the sheriff is not necessarily liable for the whole debt, but only for the damage really sustained. Thus, if the plaintiff can recover against another party, this is a ground of deduction from the damages.—*Scott v. Henley*, 1 M. & Rob. 227.

And see EVIDENCE, 5.

#### SHIP.

1. (*Rights of mortgagee.*) A ship was mortgaged to the plaintiff, with a power of sale and a direction in what manner the money produced by the sale, or by freight previously to the sale, was to be disposed of after payment of the mortgage debt. She was taken possession of by the plaintiff towards the end of the home voyage: Held, that he was entitled to the freight due in respect of that voyage, notwithstanding the Register Act. (6 Geo. 4, c. 110, s. 45.)—*Kerswill v. Bishop*, 2 Tyr. 602.

2. (*Bill of sale. Register.*) The register act, 6 Geo. 4, c. 110, s. 39, requires

that bills of sale of ships absent from port when mortgaged, shall not be registered till 30 days after their arrival in port. Three ships were mortgaged while at sea to W. by bill of sale, which was registered before their return to port. One of the ships afterwards returned, but no indorsement of the bill of sale was made on her certificate of registry. She was insured for another voyage, sailed within the 30 days, and was lost. By a subsequent bill of sale, reciting the former mortgage, the original mortgagee and W. assigned the ships, with the policies of insurance effected on two of them, and the monies payable by charterparty for the hire of the third, to J., subject to W.'s mortgage and bill of sale. This bill of sale was also registered before the return of any of the ships to port. The mortgagor became bankrupt. The other two ships afterwards returned, and their certificates of registry and bills of sale were duly endorsed according to the statute: Held, that the second bill of sale was valid as against the assignees of the bankrupt, under 6 Geo. 4, c. 110, ss. 31 and 37, both as to the interests in the ships and the policies and monies due on the charterparty.—*Exp. Jones in re Richardson*, 2 Tyrw. 671.

#### SLANDER.

1. (*Of wife, action for.*) Husband and wife cannot sue for slander of the wife in a trade carried on by her, unless it be alleged that she was divorced *a mensâ et thoro*, or had a separate maintenance. (1 Salk. 119; 1 Lev. 140; 8 T. R. 545; Bac. Abr. I. 773.)—*Saville v. Sweeny*, 1 N. & M. 254.
2. (*Variance.*) The words averred in the declaration were: "I cannot answer for the cleanliness of her person, because she takes snuff." The words proved were: "I cannot answer, &c. because *I understand* she takes snuff:" Held a fatal variance. The words in question were spoken in reply to an inquiry as to the plaintiff's character as cook.—*Cook v. Stokes*, 1 M. & Rob. 237.

#### STAMP.

An inventory referred to in an agreement as *annexed* is to be considered in computing the number of words contained in the agreement with a view to the stamp, although the inventory was stamped as an inventory, and was not really annexed till after the execution of the agreement.—*Veal v. Nichols*, 1 M. & Rob. 248.

And see EVIDENCE, 6.

TENDER. See PRACTICE, 2.

#### TRESPASS.

Trespass for turning the plaintiff out of the County Hall at Gloucester. By a private act of parliament, the hall was vested in the justices of the county, in trust to allow courts of justice &c. to sit there, and to permit it to be used for such other purposes as the greater part of the justices in sessions should direct. The hall had always been used for holding musical festivals, but there was no evidence that the justices had so

directed. The stewards of one of those festivals turned out plaintiff as an intruder: Held, that they had sufficient possession to entitle them to do so: Held also, that if plaintiff relied on his having a ticket, he must reply it specially to the plea of justification.—*Thomas v. Marsh*, 5 C. & P. 596.

And see PRACTICE, 48.

### TROVER.

1. Trover does not lie for goods taken as a distress, if any rent be due, though the distress be irregular.—*Whitworth v. Smith*, 1 M. & Rob. 193.
2. The drawer of a bill deposited it with a creditor, the proceeds to be applied, first in taking up an acceptance of the drawer, and the residue in payment of the debt due from the drawer to the creditor. The creditor, after an act of bankruptcy by the drawer, gave up the bill to the acceptor and took another bill in lieu of it: Held, that the assignees of the drawer might maintain trover against the creditor for thus parting with the bill.—*Robson v. Rolles*, 1 M. & Rob. 239.

### TRUSTEES.

(*Of turnpike road, mortgage by.*) A mortgage was executed by five trustees of a turnpike road; one of them had not been appointed under seal, as required by the local act, but had acted for many years: Held that the mortgage was valid. (2 T. R. 169; 3 C. & P. 212.)—*Doe d. Baggaley v. Hares*, 1 N. & M. 237.

USURY. See EVIDENCE, 15.

### VENDOR AND PURCHASER.

(*Entry by Auctioneer's clerk.*) Even in an action by the auctioneer, the highest bidder is bound by the entry in the sale book by the auctioneer's clerk, made in his presence, on his name being called out as the purchaser. (2 Campb. 203; 5 B. & A. 333.)—*Bird v. Boulter*, 1 N. & M. 313.

VENUE. See PRACTICE, 5, 45.

### VESTRY.

The existence of an ancient select vestry, incapable of performing the special duties contemplated by 59 Geo. 3, c. 12, does not prevent the provisions of that statute from applying; and the court granted a *mandamus* for the formation of a special vestry to perform the functions which the existing vestry could not perform, but leaving the old vestry as it stood. (2 B. & Ad. 506.)—*The King v. Churchwardens, &c. of St. Martin's in the Fields*, 3 B. & Ad. 908.

And See MANDAMUS, 2.

### WARRANT OF ATTORNEY.

1. (*Setting aside.*) A. on being applied to by B. to know if he (A.) would become security for rent due from B.'s tenant, gave B. to understand that he (A.) had no legal claim on the tenant. B. consequently refrained from distraining, and A. shortly afterwards took a warrant of attorney from the tenant, whereupon he entered judgment, issued execution, and

took possession of the tenant's goods. The court set aside the warrant of attorney on an affidavit of these facts, though A. swore that a debt was *bona fide* due to him, and though it was objected that the court could not interfere on behalf of a person not party to the warrant.—*Martin v. Martin*, 3 B. & Ad. 934.

2. The warrant of attorney did not mention interest. The defeasance stated that the warrant was given to secure both principal and interest: Held, that execution might issue for the interest.—*Shipton v. Shipton*, 1 D. P. C. 518.
3. A warrant of attorney was given to secure the payment of bills of costs to become due, as well as of bills of costs already due and advances of money already made. The court allowed it to stand good for what was already due, though bad for the rest.—*Holdsworth v. Wakeman*, 1 D.P.C. 532.
4. The warrant of attorney mentioned the plaintiff only, but the defeasance stated that it was given to secure payment to the plaintiff, his executors, administrators, and assigns: Held, that judgment could not be entered up by the executor.—*Manville v. Manville*, 1 D. P. C. 544.
5. But where in a warrant given to three, no mention is made of survivors, judgment may be entered up by the survivor.—*Build v. Wightman*, 1 D. P. C. 545.

And see PRACTICE, 7, 16.

#### WITNESS.

1. (*Attachment.*) The original *subpœna* ought to be shown at the time of service, in order to ground an attachment.—*Rex v. Wood*, 1 D. P. C. 509; *Rex v. Sloman*, *ib.* 618.
2. (*Commission for examining.*) The 1 W. 4, c. 22, s. 4, which gives power to issue commissions for the examination of witnesses, does not apply to indictments.—*Rex v. Briscoe*, 1 D. P. C. 520.
3. (*Service of subpœna.*) A lady living in the defendant's house had refused to see the clerk who came to serve her with a *subpœna*: Held, that this afforded no ground for a motion that leaving the *subpœna* at the house might be deemed good service.—*Barnes v. Williams*, 1 D. P. C. 615.
4. A witness on cross examination may admit that he has mentioned a fact on an examination before commissioners of bankrupt, though that examination is in writing, and not put into his hands or proved.—*Ridley v. Gyde*, 1 M. & Rob. 197.
5. An instrument attested by a person who has become blind may be proved by proof of his handwriting, without calling him.—*Pedler v. Paige*, 1 M. & Rob. 258.
6. In an action for negligently driving against plaintiff's carriage, he cannot examine his servant who was driving it, without a release. (8 Taunt. 454.)—*Wake v. Lock*, 5 C. & P. 454.

7. (*Bail, how made competent.*) If one of the bail be tendered as a witness for the defendant, and double the amount sworn to, be deposited with the marshal, the judge will strike his name out of the bail piece, and he may be examined. (3 C. & P. 560.)—*Pearcy v. Fleming*, 5 C. & P. 503.

#### WORK AND LABOUR.

When a party engages to do certain work according to a specification, and does not perform it as specified, what he is entitled to is the price agreed upon, subject to the deduction of the sum which it would take to make it agree with the specification.—*Thornton v. Place*, 1 M. & Rob. 218.

#### WOUNDING.

A *kicking* with intent to maim, &c., so as to break the skin, is a *wounding* within 9 Geo. 4, c. 31, s. 12.—*Rex v. Shadbolt*, 5 C. & P. 504.

---



## EQUITY.

---

4 Simons, Part 2.

---

### BANKRUPT.

A. and B. enter into partnership as brewers, A. bringing in, as his share of the capital, a brewhouse and other premises, which were subject to mortgages. A. afterwards retired from the business, which was continued by B. alone, who agreed to take the brewhouse at a valuation, but the amount was not to be paid until after the mortgages were satisfied. B. having become bankrupt, his assignees, before any proof made in respect of A.'s debt, paid off the mortgages. Held, that as no proof of A.'s debt could have been made against B.'s estate, unless the obligations to which A. was liable had been performed, the assignees were entitled to deduct the sums paid by them from the dividends on the sum which was due to A. from B. at the time of the bankruptcy.—*Rowe v. Anderson*, 267.

### DEMURRER.

1. (*Bill of revivor.*) A bill of revivor must set forth so much of the original bill, as to show that he has a title to revive the suit, otherwise it is demurrable. (See Mitford's Pleading, 76.)—*Phelps v. Sproule*, 318.
2. (*Same.*) A. died, having appointed B. his executor, who without proving possessed himself of part of the assets. B. died, having appointed C. his executor, who proved his will, and also took out letters of administration with the will annexed to A. A bill was filed against C., for an account of the personal estate of A. possessed by B., and by C. since B.'s death. C. having afterwards died, appointed D. his executor, who proved his will, and E. took out administration with the will annexed to A. The plaintiff then filed a bill of revivor against D. and E. A demurrer by D. was allowed, on the ground that he was not the representative of A.—S. C. 321.

**EVIDENCE.** See **TITHES**, 2.

### INCUMBRANCES.

1. (*Priority.*) A. being possessed of a leasehold house, deposited the lease with B. as a security for a debt. C. afterwards obtained a judgment against A., and issued a *fi. fa.* thereon. The sheriff seized and sold goods of A., but not the house, and returned the writ. Whilst the writ was in the sheriff's hands D., with A.'s consent, paid the debt due to B., and took a transfer of B.'s lien as a security for that debt, and for other sums due to him from A. Held, that C. having allowed the writ to be returned without requiring a sale of the house, lost his priority over D., who thereby

became the first incumbrancer for his whole claim. (*Causton v. Mackleu*, 2 S. 242.)—*Williams v. Craddock*, 313.

2. (*Ecclesiastical*.) A clergyman seised in fee of the advowson of a rectory, conveyed it to a trustee to secure an annuity, and, as a further security, executed a warrant of attorney. Held, that although the conveyance was void under the statute 13 Eliz. c. 20, the warrant of attorney was good, the statute being silent with respect to it.—*Aberdeen v. Newland*, S. 281.

(The statute provides, that no lease to be made of any benefice, or ecclesiastical promotion, with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident, and serving the cure of such benefice without absence above fourscore days in any one year, but that every such lease, so soon as it, or any part thereof, shall come to any possession, or use, above forbidden, or immediately upon such absence, shall cease and be void, and the incumbent so offending shall for the same, lose one year's profit of his said benefice, to be distributed by the Ordinary among the poor of the parish: and that all chargings of such benefices with cure hereafter with any pension or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this act, shall be utterly void.)

#### INFORMATION.

After exceptions had been allowed to the answer to an information, the Court, being of opinion that the interrogatories were more extensive than the purposes of the suit required, referred it to the Attorney General to consider what course ought to be taken with respect to the exceptions, and stayed all proceedings in the suit in the mean time: this reference may be made at any stage of the cause however late. (*Attorney General v. The Corporation of Exeter*, 2 Russ. 362; *The Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. S. 17.)—*Attorney General v. The Mayor and Corporation of Carlisle*, 275.

#### INJUNCTION.

(*Expectant heir*.) Injunction granted to restrain a tradesman from proceeding at law on securities for the price of goods furnished to an expectant heir in embarrassed circumstances, with the knowledge that the purchaser intended to sell them in order to raise money. (*Barker v. Vansommer*, 1 Bro. Ch. Cas. 149.)—*King v. Hamlet*, 223.

#### INTERPLEADER.

B. and Co. deposited goods with the plaintiffs (warehousemen) to await their directions; and they afterwards directed that the goods should be transferred to and held for T., which was done accordingly. The goods were subsequently claimed by C. as having been deposited by him with B. and Co., as his agents, for the purpose of sale. Held, that although the plaintiffs were the agents of B. and Co., yet that C. claimed under a paramount title; and, therefore, that it was a case of interpleader.—*Pearson v. Cardon*, 220.

**JURISDICTION.**

If a party claims before the Commissioners appointed under the conventions for indemnifying British subjects for the confiscation of their property by the French Revolutionary Government, in a character which he really sustains, and an award is made to him in that character, a Court of Equity has no jurisdiction to interfere at the suit of a party claiming to have a better title to the compensation. (*Hill v. Reardon, Jacob, 84; 2 S. & S. 431; 2 Russ. 608.*)—*Lloyd v. Trimlestown, 296.*

**LEGACY.**

A testator devised certain estates to A. for life, remainder to B. in fee. He gave a legacy to C. to be paid by B., within twelve months after the death of A., and he charged his estates with the payment of the legacy. C. died in A.'s life-time. Held, that although the payment was postponed, the legacy vested on the death of the testator. (*Lowther v. Coudon, 2 Atk. 127.*)—*Poole v. Terry, 294.*

**PLEA.**

(*Plea.*) Where a right of action is founded upon a variety of circumstances put together, a plea which attempts to show that the action cannot be maintained, by confessing and avoiding some of the circumstances, and denying the rest, is bad; as reducing the plaintiff to the necessity of proving in equity, without a discovery, that he has a right to support the action.—*Robertson v. Lubbock, 161.*

**PRACTICE.**

1. (*Production of deeds by defendant.*) On an information to set aside leases granted by a corporation, a defendant was ordered to produce certain deeds by which the leases had been subsequently settled, and which he by his answer admitted to be in his possession; on the ground that if the leases were set aside, every portion of the legal estate in the terms must be surrendered or assigned, and the Attorney General had therefore a direct interest in the deeds in question.—*Attorney General v. Ellison, 236.*
2. (*New trial of issue.*) A Court of Equity directs an issue to satisfy itself what is the truth of the case; and if it appears that, notwithstanding the improper reception or rejection of evidence, there is enough in the case to sustain the finding of the jury, the Court will not direct a new trial. (*Warden and Minor Canons of St. Paul's v. Morris, 9 Ves. 155.*)—*Tucker v. Wilkins, 241.*

And see **DEMURRER.**—**INFORMATION.**

**REVERSIONARY INTEREST.**

1. (*Inadequacy of price.*) A sale by an heir apparent of his reversionary interest, was set aside on account of inadequacy of price, and advantage taken of his embarrassments. (*Davis v. Duke of Marlborough, 2 Swans. 108.*)—*Earl of Portmore v. Taylor, 182.*
2. (*Evidence.*) The evidence of an actuary, where there is nothing to contradict it, is sufficient to prove the value of reversionary interests.—**S. C.**

**TITHES.**

1. (*Calves.*) The tithe of calves is the tenth in order of birth, and not one in every ten of average quality with the remaining nine. (See *Trateman v. Carrington*, 1 Cr. & J. 320.)—*Carrington v. Cornock*, 217.
2. (*Evidence.*) On the trial of an issue directed in a suit for tithes by the rector against occupiers, in which the defendants had pleaded a modus to be payable to the vicar for the tithes claimed; held, 1st, that a document, dated in 1327, purporting to be made by the then bishop of the diocese, ordaining that certain additional benefits should be given to the vicar, and which was contained in an old book, recording the acts of former bishops, produced from the bishop's registry, was admissible for the plaintiff, (the registry having been searched for the original without success;) and that no search was necessary, either in the Augmentation Office, or the vicar's residence, notwithstanding it was expressed in the document that one part should be kept by the treasurer of the bishop, and that the other should remain with the vicars. (*Bullen v. Mitchell*, 2 Price, 418; 4 Dow, 326.) 2dly, that a terrier signed by the person who at the time was both prebend and rector, and also vicar of the parish, whose handwriting was proved, and also signed by the churchwardens and other persons, was admissible for the plaintiff, although it was produced by a person who claimed the tithes of a particular district in the parish, from his own custody, and not from the proper depositories. (*Bullen v. Mitchell*, *Barker v. Baker*, *Wightwick*, 397.) 3dly, that the issue and finding of the jury, but not the interrogatories and depositions, in two former suits, respecting the right to tithes of certain lands in the parish which were not the subject of the present suit, were admissible for the defendants. 4thly, *Semle*, that Bishop Well's Liber de Ordinationibus Vicariorum may be received in evidence to prove a vicar's endowment.—*Tucker v. Wilkins*, 241.

**TRUSTEE.** See **VENDOR AND PURCHASER.**

**VENDOR AND PURCHASER.**

A testator devised his real and personal estate to trustees to sell for the benefit of his children, and directed that their receipts should be sufficient discharges. A bill having been filed by the infant children to have the will established, and the trusts of it performed, the Court at the hearing dismissed the bill as against the heir, and did not establish the will, but made a decree respecting the personal estate only. The suit afterwards became abated, and was not revived. Another suit was instituted some time subsequently, for the purpose of having new trustees appointed, which was done. The new trustees sold part of the real estates to the plaintiff, who filed a bill for specific performance. Held, that in consequence of the dismissal of the first bill as against the heir, there was no *lis pendens* as to the real estate, and that the new trustees could give good receipt for the purchase-money.—*Drayson v. Pocock*, 283.

## BANKRUPTCY.

[Containing Montague & Bligh, Parts I. and II., and 2 Deacon & Chitty, Part I.]

### ACQUIESCENCE.

1. A bankrupt who had never surrendered was restrained by order, on petition, from proceeding in actions against the assignees and a purchaser under the commission, to try its validity, after long acquiescence and acts of co-operation in the proceedings consequent on the commission done by him or under his authority. (Ex parte Grant, Buck, 90; Ex parte Lewis, 2 G. & J. 208; Flower v. Herbert, 2 Ves. 825.)—*Exp. Hornby*, M. & B. 1.
2. (*Superseding.*) A creditor who had not proved, petitioned to supersede, or that the assignees might be removed; the *supersedeas* was refused, but the assignees were removed on the creditor's counsel undertaking that the creditor would prove: Held, that the creditor could not appeal, as by proving he had debarred himself from objecting to the validity of the commission.—*Exp. Green*, M. & B. 90.

### ALLOWANCE.

Where the estate pays only ten shillings in the pound, the bankrupt is not of right entitled to an allowance. (Ex parte Pavey, 2 G. & J. 368.)—*Exp. Petherbridge*, M. & B. 161.

### ASSIGNEE.

1. (*Renewed Commission.*) Upon issuing a renewed country commission, it is the duty of the assignees, or their agent, (the solicitor,) to ascertain whether the commissioners are able and willing to act; otherwise they are liable to the costs of a new fiat, if it be necessary from inability or unwillingness to act on the part of the commissioners who are named in the renewed fiat.—*In the matter of Wilkinson*, D. & C. 112.
2. (*Accounts.*) The assignees are bound to furnish a creditor who has proved with a copy of the accounts, if he offers to pay the expense of making such copy.—*Exp. Aberdeen*, D. & C. 34.
3. (*Examination of.*) Although an audit meeting has closed, and the assignees' accounts are then settled, the commissioner at any future meeting has power to examine the assignees as to monies received before and not included in such accounts, and to reinvestigate those accounts generally.—*In the matter of Applegath*, D. & C. 101.
4. (*Official.*) An official assignee cannot, under the 1 & 2 Will. 4, c. 56, s. 22, take the bankrupt's money out of the hands of a solicitor, without discharging his lien: the enactment not interfering with the rights of other parties.—*Exp. Bowden*, D. & C. 182.

## ASSIGNMENT.

A., trading in London on his separate account and at Brazil in partnership with B. and C. under the firm of *A. and Co.*, becomes insolvent, when four of his creditors are appointed inspectors of his estate, who, it was agreed, should receive the several consignments and remittances expected from the Brazil house, as trustees for the persons to whom the same might be ultimately found to belong. The Brazil house, ignorant of A.'s insolvency, make various consignments to A., directing him to sell them at certain places abroad, and the proceeds to be placed to the account of the Brazil house. These goods are accordingly sold, under the direction of the inspectors, and the proceeds received by them. At the time of A.'s insolvency, he was under acceptances to the Brazil house to a larger amount than the value of the consignments, but such acceptances were on a general account, and not on account of any particular consignment from the foreign house. A. afterwards becomes bankrupt, and a cession of the effects of the Brazil house is also made to assignees, according to the laws of Brazil: Held, that the proceeds of the goods must be dealt with as the goods themselves would have been if they had remained in specie, and that they belonged to the creditors of the Brazil house, and not to the separate creditors of the bankrupt in England. (*Vertue v. Jewell*, 4 Camp. 31.)—*Exp. Wucherer*, D. & C. 27.

## BANKRUPT.

1. (*Criminating himself.*) *Quære*, whether a bankrupt can be compelled to criminate himself. (*Exp. Heath*, M. & B. 184.)—*In the matter of Freaks*, M. & B. 215.
2. (*Commitment.*) *Quære*, whether a bankrupt can be committed by the Court of Review for not answering fully.—S. C.
3. (*Concealment.*) *Quære*, whether a bankrupt, after he has passed his last examination, can be examined as to concealment.—*Exp. Smith*, M. & B. 203.
4. (*Security for Costs.*) The Court will not, under any circumstances, before hearing, order a bankrupt to give security for costs. A motion for it was refused with costs, to be set off against those due from the bankrupt. Where a former petition of a bankrupt was, by the Vice-Chancellor, dismissed on the merits, with costs to be paid by the bankrupt, who continues in contempt for non-payment of them, he has no *locus standi* in this Court, being considered in contempt of this Court also. And a former decision on the same matter was held an estoppel.—*Exp. Munk*, D. & C. 120.

And see PRACTICE, 11.

## CERTIFICATE.

1. (*Costs—Petition to prove.*) A petition to prove a debt and stay certificate, should state the grounds on which the commissioner rejected the proof; the Court refused leave to amend. (*Buck*, 94; *Cox*, 308; *1 Rose*, 274.)—*Exp. Pearse*, M. & B. 262.

2. (*Defect in signature.*) Where, to the signature of a creditor to a certificate, the date of the year was omitted, it being ascertainable by dates annexed to the names of the creditors preceding and following that of the creditor in question, the general order, 8th August, 1807, was dispensed with, and the commissioner was directed to sign the certificate.—*Exp. Moul, M. & B. 262.*
3. (*Allowance.*) Where the bankrupt's certificate has been stayed at the instance of creditors, who afterwards withdraw their opposition to it, and appear by counsel to consent to its allowance, the Court will allow the certificate, without the usual explanatory affidavit. (See *Exp. Gibson, 6 Ves. 5.*)—*In the matter of Hall, D. & C. 44.*

#### COMMISSION.

A commission issues against a man by the name of "Wicks," under which name he traded, and contracted debts, although "Knox" was his real name. Two years afterwards, and before the bankrupt had passed his last examination under the commission, a fiat is issued against him by his right name. The commission was preferred to the subsequent fiat.—*Exp. Sambourne, D. & C. 22.*

See FIAT.

#### CONSIGNOR AND CONSIGNEE.

Where a consignee transferred bills of lading to a creditor, who signed a memorandum acknowledging that he had received the bills in consideration of the money due to him; but before the delivery of the goods the consignee stopped them *in transitu*: Held, that the creditor had a right to repudiate his claim on the bills, and to issue a fiat against the consignee on his original debt.—*Exp. Ashton, D. & C. 5.*

#### CONSOLIDATION.

Where the joint and separate creditors, at a meeting duly convened for that purpose, agree to consolidate the two estates, the Court will refer it to the Commissioner, to inquire whether such consolidation is for the general benefit; but will not, upon such a resolution alone, bind the interests of the absent creditors of both classes. (*Exp. Strutt, 1 G. & J. 29.*)—*Exp. Part, D. & C. 1.*

CONTINGENT DEBT.—See PROOF, 4, 5, 6.

COSTS.—See BANKRUPT, 4; SOLICITOR, 3, 4.

#### DIVIDEND.

Where a creditor addresses a written request to assignees in general terms to pay "the dividends made on the bankrupt's estate" to A. B., the assignees are justified in paying subsequent dividends to A. B., until they have notice from the creditor that he has revoked A. B.'s authority.—*Exp. Bright, D. & C. 8.*

#### ELECTION.

Where a bankrupt petitioned to supersede while an action brought by him against the petitioning creditor to try the validity of the commission was



pending, the bankrupt was put to his election which remedy he would pursue. (Exp. Burgess, Jacob, 559; Exp. Price, Buck. 230.)—*Exp. Drake*, D. & C. 92.

And see PRACTICE, 5; PROOF, 1.

## EVIDENCE.

1. (*Parol to control written.*) A bankrupt, previous to his bankruptcy, gave a bond to trustees for payment of £5000 and interest, as a provision for his daughter on her marriage. The trustees having proved the amount under the commission, a petition was presented to expunge the proof, the bankrupt alleging that when the bond was given it was understood between him and the obligees that it was only to be available in the event of the success of a certain speculation: Held, that parol evidence could not be admitted to control the effect of the bond, there being no pretence of fraud. (*Rawson v. Walker*, 1 Star. 361.)—*Exp. Morley*, D. & C. 50.
2. (*Superseding Commission.*) On a petition by assignees to supersede a commission, the bankrupt's affidavit is admissible to show that the commission was fraudulently concerted.—*Exp. Bellwood*, D. & C. 37.
3. (*Bankrupt.*) The bankrupt's examination cannot be read as evidence against a third party who had no power of cross-examining him. Notice of reading is also necessary. *Semble*, the bankrupt himself cannot take the objection.—*Exp. Arnby*, D. & C. 212.
4. (*Cross-examination.*) If on cross-examining a witness an irrelevant question be put, evidence cannot be produced to contradict him, the question and answer being irrelevant to the matters before the Court. (*Harris v. Tippet*, 2 Campb. 637.)—S. C.

## FIAT.

1. (*Issuing.*) Where a fiat was not prosecuted in due time, on account of a mistake in the name of the bankrupts, an order was considered necessary to enable the same party to sue out a new fiat.—*In the matter of Edwards*, M. & B. 263.
2. (*Amending.*) Order to take a fiat off the file to be amended. An order had been obtained from the Lord Chancellor, but it was doubted whether he has jurisdiction to order a fiat to be amended.—*In the matter of Rudd*, M. & B. 264.
3. (*Amending.*) A fiat may be amended by adding a surname where no proceedings have taken place under it.—*In the matter of Dowell*, M. & B. 264.
4. (*Opening.*) Time to open a fiat enlarged, where the witness to support it keeps out of the way, and is summoned to attend on a future day.—*Exp. Fox*, M. & B. 264.
5. (*Opening.*) The time for opening will not be enlarged on the application of the *petitioning creditor* to give time to effect a composition, although the Court might interpose on a petition by the bankrupt for that purpose.—*Exp. Cradock*, M. & B. 264.
6. (*Annulling.*) On an application to annul a town fiat, the affidavit stated

that "the major part in number of the creditors resided at Birmingham, and although the bankrupt resided in London, yet it would be of great saving to the estate to allow this course, rather than that the creditors should travel to London in order to prove their debts:" Held, that the affidavit was insufficient, inasmuch as the majority mentioned might be produced merely by the smallest difference in amount or value; and that the distance was sufficient to entitle the creditors to prove by affidavit if they thought proper. (Exp. Johnson, 1 D. & C. 221.)—*Exp. Leonard*, D. & C. 182.

7. (*Service.*) Where the time for opening a fiat expires by the voluntary act of the petitioning creditor, and it appears it was issued under suspicious circumstances, namely, for effecting a compromise with the creditors and not with a *bonâ fide* intention of working it, and a second fiat is issued by another creditor under Lord Loughborough's General Order, the Court will not supersede the second fiat, merely because it was issued by a creditor who was a party to the intended compromise under the first, unless it is clearly for the advantage of the general creditors that the first should stand, and the second be superseded. (Exp. Luke, 1 G. & J. 364.)—*Exp. John Anjer*, D. & C. 67.

8. (*Opening.*) The time for opening a fiat will not be enlarged to give effect to an arrangement for a composition. (Exp. Douton, 1 D. & C. 111.)—*In the matter of Moody*, D. & C. 210.

#### MORTGAGE.

1. (*Equitable.*) Where an equitable deposit is made, accompanied with a memorandum, for a debt subsequently discharged, and on a fresh debt contracted, it is verbally agreed that the deposit shall continue as a security for the latter debt, the mortgagee is not entitled to costs out of the produce of the sale.—*Exp. Pigeon*, D. & C. 118.

2. (*Sale.*) The Court has jurisdiction to order a sale of an estate legally mortgaged, on application of the mortgagee, giving him leave to bid. (See Exp. Moore, Petition, 2.)—*Exp. Bacon*, D. & C. 181.

3. (*Conduct of Sale.*) Although an equitable mortgagee may waive his privilege of applying for leave to bid, the assignees will still have the conduct of the sale.—*Exp. Smith*, D. & C. 60.

4. (*Equitable.*) *Quære* whether a third mortgagee has a right to the costs of a petition to sell, or whether he ought not to apply to the Commissioner under the general order.—*Exp. Robinson*, D. & C. 110.

And see WAIVER.

#### PARTNER.

1. (*Bankruptcy.*) A solvent partner cannot, after an act of bankruptcy by his co-partner, followed by a commission, bind the joint property, the assignees being tenants in common of the property from the act of bankruptcy.—*Exp. Ellis*, M. & B. 249.

2. (*Proof.*) A. being a dormant partner with B., dissolves partnership, and B. is declared indebted to A. on the balance. A. sues B. and

- receives from him a cognovit for the amount of the balance and costs.
- B. afterwards becomes a bankrupt. Held that A. is entitled to prove his debt against the estate, although some partnership debts are unpaid. *Exp. Grazebrook, D. & C. 186.*

And see PROOF, 1, 11.

## PETITION.

1. (*Executors.*) Where the bankrupt is one of two executors, the petition of a party interested under the will must be served on the other executor as well as on the bankrupt and on the assignees.—*Exp. Cutting, D. & C. 3.*
2. (*For sale.*) A petition for the sale of property, in respect of which the creditor holds a legal security, will be dismissed with costs. (See *Exp. Bacon, Mortgage, 2.*)—*Exp. Moore, D. & C. 7.*
3. (*Dismissing.*) Order to amend, conditionally, that a party should be served, and the petition be heard in fourteen days. Default having been made in these conditions, the petition was dismissed with costs.—*Exp. Green, D. & C. 35.*
4. (*Multifarious.*) A petition by various creditors to expunge proofs, to admit proofs, and to remove the assignees, is not multifarious, as the prayer for the removal of the assignees is a common object, and the rest may be considered as surplusage. (*Exp. Howell, Exp. Bousfield, 1 Mont. 127, 128.*) But the removal of the assignees being refused, the petition then becomes multifarious.—*Exp. Grazebrook, D. & C. 186.*

## PLEDGE.

A bankrupt while in partnership with K., deposits a lease with a creditor, and the partnership is afterwards dissolved, when certain arrangements are made between the bankrupt and the solvent partner: Held, that no subsequent arrangement of this kind will affect the rights of the creditor under the original deposit, and that he is entitled to the usual order for the sale of the property.—*Exp. Booth, D. & C. 59.*

## PRACTICE.

1. (*Advertisement.*) The publication of the advertisement of a bankruptcy will not be postponed, although a large majority of the creditors consent, unless there be some defect in one of the requisites to support the commission. (*Exp. Ogilby, 1 G. & J. 250.*)—*Exp. Ruffenstein, Exp. Edwards, M. & B. 84—255; Re Hambden, D. & C. 209.*
2. (*Assignment.*) On a new choice of assignees, it is not necessary to vacate the assignment, the estate vesting in the new assignees by operation of law.—*Exp. Forster, Exp. Falar, M. & B. 87—262, (notes.)*
3. (*Costs.*) Costs will not be given against a bankrupt upon a petition to annul a fiat.—*Exp. Heath, M. & B. 116.*
4. (*Petition by stranger.*) The court will not interpose on the petition of a stranger for the delivery up of property alleged to be improperly detained by the assignees, except in clear cases, and of immediate injury, (*Re Boldero, 1 Rose, 232.*) *Exp. Heath, M. & B. 169.*

5. (*Election.*) If a petition is ordered to stand over, without prejudice to the petitioner's proceeding at law, and the petitioner commence an action, the court will not compel him to elect.—*Exp. Heath*, M. & B. 183.
6. (*Costs.*) Where on a petition a proof was expunged on grounds not taken before the commissioner, the respondent's costs were directed to be paid out of the estate as well as those of the assignees.—*Exp. Ellis*, M. & B. 249.
7. (*Signature of certificate.*) The signature to a certificate made on a foreign power of attorney, of the due execution of which, in the presence of the attesting witness, there was no affidavit, but to which was affixed the official signature and seal of the consul in whose presence it was executed, was allowed to pass upon an affidavit by a merchant in London verifying the handwriting of the consul and attesting witness.—*Exp. Wilkinson*, M. & B. 257.
8. (*Assignee.*) An assignee removed for the benefit of the estate is entitled to his costs out of the fund in hand, before it is transferred to the new assignee.—*Exp. James*, M. & B. 262, (notes.)
9. (*Petition to prove.*) A petition for leave to prove must state the grounds on which the proof was rejected by the commissioner.—*Exp. Worth*, D. & C. 4.
10. (*Costs.*) Where notice is given to the respondent of a motion for leave to amend the petition, and such permission is granted after the respondent appears to oppose it, the respondent will not be entitled to the costs of the day.—*Exp. Green*, D. & C. 42.
11. (*Surrender of bankrupt.*) Where a bankrupt omits to surrender within the given time, the court will under some circumstances appoint a fresh meeting to take his surrender.—(*Exp. Shiles*, Rose, 381; *Exp. Berryman*, 1 G. & G. 223.)—*Exp. Jeffreys*, D. & C. 86.
12. (*Costs.*) Petition to supersede, on the ground of there being no petitioning creditor's debt. The deposition of the debt referring to an account, which purported to be annexed, but which was not to be found among the proceedings, the respondents were ordered to pay the costs of the day, the court having for this cause adjourned the hearing of the petition.—*Exp. Clarke*, D. & C. 86.
13. (*Staying adjudication.*) Adjudication stayed, on affidavit that the party owed no debt to the petitioning creditor, and had not committed an act of bankruptcy, with liberty to the petitioning creditor to apply.—(*Exp. Proston*, 1 Rose, 259.)—*Exp. Fletcher*, D. & C. 90.
14. (*Jurisdiction.*) Although the Court of Review cannot rescind an order of the Lord Chancellor, it can intimate its opinion to him, and he would act upon it.—*Exp. Anjer*, D. & C. 67.
15. (*Reference for impertinence.*) Affidavits will not be referred for impertinence until the petition is heard, it being impossible to decide on impertinent matter until going into the merits of the case. (*Exp. Williamson*, 1 D. & C. 529.)—*Exp. Amsby*, D. & C. 119.

16. (*Viva voce examination.*) A *viva voce* examination is not granted unless the court thinks it necessary for the elucidation of the facts in question, that is, after hearing the petition on affidavit.—S. C. and *Anonymous*, D. & C. 140.

17. (*Production of documents.*) Where documents are referred to in an affidavit, it does not give the other side an absolute right to their production, but it is a matter for the discretion of the court. A motion for this purpose, before the hearing of the petition, was refused with costs. (See *Wiley v. Pistor*, 7 Ves. 411.)—*Exp. Arnsby*, D. & C. 192.

18. (*Voting.*) Where an order of the court is necessary to enable a party (as a trustee) to prove, he cannot vote or sign the certificate. (*Exp. Shaw*, 1 G. & J. 127, 163.)—*Exp. Wyatt*, D. & C. 211.

And see SUPERSEDEAS.

#### PRISONER.

(*Discharge of.*) On an application by a prisoner to be discharged from an illegal arrest, the court cannot impose terms or order the costs to be paid out of the estate. (*Exp. Wood*, 18 Ves. 1.)—*Exp. Hilsby*, M. & B. 79.

#### PROOF.

1. (*Election.*) G. was engaged as partner in four different concerns. A commission issued against J. and Co., one of them; and another commission issued against B. and G., another of them. W. held a bill of exchange, drawn by B. and G. and Co., and accepted by J. and Co. W. proved under the commission against the acceptors, J. and Co., under which a dividend had been declared before the 25th of March, 1830, on which day W. proved the whole amount against the joint estates of B. and G., and the difference between the whole amount and the amount of the dividends declared under the commission against J. and Co. against the separate estate of G.: Held, that W. was not entitled to double proof. (*Exp. Husband*, 1 G. & J. 108; *Exp. Bonbonus*, 8 Ves. 540; *Exp. Walker, Rose*, 441.)—*Exp. Moult*, M. & B. 28.

2. (*Consent of assignees.*) When the assignees consent to the proof by the agent of a public company abroad, the bankrupt cannot vary the proof, by suggesting that it might injure him.—*Exp. Cotesworth*, M. & B. 92.

3. (*Annuity.*) If an annuity is granted in consideration of the relinquishment of a business, the creditor is entitled to prove for the value at the time of the bankruptcy, without reference to the consideration given or the lapse of time since the granting of it.—*Exp. Saxe*, M. & B. 134.

4. (*Contingent debt.*) A. granted an annuity to B., and C. as surety, covenanted that if A. should make default in payment, C. would immediately after such default pay what was due. C. afterwards, and before default, became a bankrupt: Held, that this was not a debt contracted, but merely a collateral liability incapable of valuation at the time of the bankruptcy, and therefore not proveable under the 56th section of the act 6 G. 4, c. 16. (*Exp. Fairlie*, Mont. 17; *Hoffman v. Fourdrinier*, 5 M. & S. 21.)—*Exp. Thompson*, M. & W. 219.

5. (*Contingent debt.*) A. gave to B. an undertaking that in consideration of B. allowing C. to draw on him to the extent of 12,000*l.* A. would guarantee that amount. B. accordingly accepted bills drawn by C. A. became a bankrupt before these bills became due. After the commission B. paid the amount of the bills accruing at the time of the commission, which, through the default of A. in reimbursing him, had become due under the guarantee: Held, that the bills having become due before the proof was tendered, the contingency upon which the debt was to accrue had happened, and the amount paid by B. was proveable under the 10th section of the act 6 G. 4, c. 16. (*Exp. Tindall*, Mont. 462; *Exp. Gurney*, M. & M. 290.)—*Exp. Myers*, M. & B. 229.
6. (*Contingent debt.*) Where the bankrupt had given an indemnity bond, and the amount of the damage was not ascertained, the court directed a claim to be entered.—*Exp. Marshall*, M. & B. 242.
7. (*Third Commission.*) It is no objection to the proof of a debt under a third commission, that the creditor might have proved it under the second commission, under which the bankrupt has obtained his certificate, if the bankrupt has not paid 15*s.* in the pound under the second commission. (*Hovil v. Browning*, 7 East, 154.)—*Exp. Morley and another*, D. & C. 45.
8. (*Merger.*) B. and C., being indebted to A., give a joint and several bond. A. takes (as part of the same security) a joint warrant of attorney and enters up a joint judgment. B. and C. become bankrupt: Held, that the bond is merged in the judgment, and that A. can only prove against the joint estate of B. and C. (*Bassett v. Wood*, Litt. Rep. 17.)—*Exp. Christy*, D. & C. 155.
9. (*Rejection.*) Where commissioners have once rejected a proof and referred the creditor to a subsequent meeting, he is not debarred from petitioning to prove because he did not choose to attend such subsequent meeting. *Exp. Skipp*, D. & C. 88.
10. (*Trustees.*) Where trustees of a marriage-settlement lend money of the wife's to her husband with her consent, and the husband continue to support her until he becomes a bankrupt, they cannot prove for the interest of the sum lent. It might be otherwise if they were liable for the interest, from the wife's not consenting to the loan, or any other reason.—*Exp. Green*, D. & C. 113.
11. (*Between partners.*) Where part of the account between two mercantile houses, which became bankrupt, consists of bills that may be proved against both estates, there can be no proof in respect of those bills, as between the two houses, unless there is a surplus after satisfying the holders of the bills. (*Exp. Rauson*, Jac. 274; *Exp. Walker*, 4 Ves. 373.)—*Exp. Laforest*, D. & C. 199.

And see PRACTICE, 2.

#### REPUTED OWNERSHIP.

1. (*Policy of insurance.*) The assignment of a policy of insurance without notice to the office does not prevent the operation of the clause of reputed

ownership. (*Ryall v. Rowles*, 1 Ves. 348; *Exp. Burton*, 1 G. & J. 207.)—*Exp. Tennyson*, M. & B. 67.

2. (*Horses hired.*) It appearing to be the custom in London for persons engaged in the trades of brewers, coal merchants, ironmongers, &c. to hire cart-horses; assignees were ordered to deliver up a horse which they claimed as in the reputed ownership of the bankrupts, who were ironmongers.—*Exp. Wiggins*, M. & B. 168.

#### SOLICITOR.

1. (*Delivering up proceedings.*) It is a matter of course, if a solicitor refuses to deliver up the proceedings to the assignees, for the order upon him to be made with costs. (*Exp. Hardy*, 1 Rose, 396.)—*Exp. Green*, M. & B. 90.
2. (*Jurisdiction of Court over.*) *Quære*, whether the Court has jurisdiction over a solicitor to compel him to pay over money belonging to the bankrupt, received by him as a solicitor of the Court.—*Exp. Hicks*, M. & B. 256.
3. (*Costs.*) On an affidavit being taken off the file for scandal, the London agent was held liable for costs and expenses as between solicitor and client. (*Exp. Simpson*, 15 Ves. 476; *Exp. Kirby*, Mont. 68.)—*Exp. Wake*, M. & B. 259.
4. (*Costs.*) A solicitor attesting a vexatious petition by an illiterate person, was ordered to pay costs personally.—*Exp. Williamson*, M. & B. 266. (note.)

And see ASSIGNEE, 4.

#### SUPERSEDEAS.

1. (*Judgments.*) On a *supersedeas* by consent of creditors, a purchaser under the commission is entitled to be indemnified against judgments outstanding before the bankruptcy.—*Exp. Lautour*, M. & B. 89.
2. (*Consent.*) An order to supersede, with consent of creditors, made after second meeting.—*Exp. Luck*, M. & B. 268.
3. (*Consent.*) Where all the creditors consent to a *supersedeas* except A., who is abroad, and B. holds a power of attorney from A. authorizing him to consent: Held, B. was entitled to consent: and an attested copy of the power was ordered to be filed with the proceedings.—*Exp. Hamilton*, D. & C. 139.
4. (*Surrendering.*) Before a bankrupt can petition to supersede he must surrender to the fiat, notwithstanding the 42 days have not expired. (*Exp. Peaker*, 2 G. & J. 337.)—*Exp. Drake*, D. & C. 91.
5. (*Lapse of time.*) The Court refused to supersede a commission thirty years old, on the ground that all the creditors had been paid except one, by whom a claim had been placed on the proceedings, but never established. *Exp. Lupton*, D. & C. 136.
6. (*Creditor.*) Although the adjudication has been reversed, a creditor has no right to the annulling the fiat even on a petition presented before the 42d day, if, up to the hearing of the petition, the bankrupt has never surrendered. (*Exp. Foulger*, 18th Feb. 1833.)—*Exp. Clarke*, D. & C. 194.



## USURY.

1. (*Commission.*) The charge of 10s. per cent. for commission besides the legal interest, on a loan of money, is not usurious, if it is referable to trouble and expense *bond fide* incurred by the lender; although he may not be a banker, or a person engaged in trade, or although the money lent is his own, and not that of other persons. (*Carstairs v. Stein*, 4 M. & S. 201.)—*Exp. Gwyn*, D. & C. 12.
2. (*Bill broker.*) A bill broker, in order to get a bill discounted at 4 per cent., takes upon himself the responsibility of indorser, and charges his principal 5 per cent. discount, which is the lowest sum at which he could have done the business, except for his indorsement: Held, that although he also charged 10s. per cent. for his trouble, it was not usury. (*Lee v. Coss*, 1 Taunt. 511.)—*Exp. Goss*, D. & C. 242.

## WAIVER.

The petitioner, an equitable mortgagee of leasehold property, obtained an order for a sale, at which £950 was bid for the mortgaged premises, but they were bought in by direction of the assignees. The petitioner afterwards applied to the commissioners for another sale, but the order they made being unsatisfactory to him as to the time of sale, he refused to accept it; and the assignees afterwards obtained another order, when the highest bidding was only £650: Held, that the petitioner having by his application for a second sale waived his right to complain of the first, was not entitled to the difference between the amount of the biddings at the first and second sale, but that he was entitled to have the expenses incurred since the first sale, together with the ground-rent and all dues since accrued, paid out of the bankrupt's estate.—*Exp. Baldock*, D. & C. 60.

## WITNESS.

A witness from *Gravesend* having attended this Court pursuant to a summons, being arrested for debt in *Pancras Lane, City*, while waiting for the conveyance home, was discharged; although he had, on leaving this Court, gone to *Catharine Street, Strand*; but without costs as against the officer, he not having been shown the summons to attend this Court.—*Exp. Clark*, D. & C. 99.

## LIST OF CASES.

## COMMON LAW.

- Aiken v. Howell**, 1 N. & M. 191..... Practice, 4  
**Aliven v. Furnival**, 1 D. P. C. 614, 690 ..... Arrest, 4; Pleading, 4  
**Anderson v. Bell**, 2 Tyrw. 732 ..... Arrest, 2  
**Anonymous**, 1 M. & Rob. 467 ..... Certificate for Immediate Execution, 1  
 ——— 1 D. P. C. 513, 654..... Practice, 23; Process, 2  
**Archbold v. Sweet**, 1 M. & Rob. 162 ..... Action on the Case, 2  
**Arden v. Tucker**, 1 M. & Rob. 191 ..... Attorney, 12  
**Arundel v. Chitty**, 1 D. P. C. 499 ..... Arrest, 3  
**Askew v. Hayton**, 1 D. P. C. 510..... Certiorari, 2
- Baker v. Rye**, 1 D. P. C. 689 ..... Judge 2  
**Barnes v. Williams**, 1 D. P. C. 615 ..... Witness, 3  
**Barter v. Taylor**, 1 N. & M. 11 ..... Action on the Case, 1  
**Bayntun v. Cattle**, 1 M. & Rob. 265 ..... Illegal Contract  
**Beckford v. Crutwell**, 1 M. & Rob. 187 ..... Pleading, 5  
**Bird v. Boulter**, 1 N. & M. 313 ..... Vendor and Purchaser  
**Blake v. Pilford**, 1 M. & Rob. 198 ..... Evidence, 9  
**Blofeld v. Payne**, 1 N. & M. 353 ..... Piracy  
**Bowman v. Russell**, 2 Tyrw. 744..... Bail, 2  
**Bowring v. Bignold**, 1 D. P. C. 685 ..... Practice, 45  
**Britten v. Wait**, 3 B. & A. 915..... Clergy, 1  
**Brookes v. Hutchinson**, 1 D. P. C. 493 ..... Insolvent Debtor, 2  
**Brown v. Probert**, 1 D. P. C. 659 ..... Practice, 42  
**Build v. Wightman**, 1 D. P. C. 545 ..... Warrant of Attorney, 5  
**Bulwer v. Horne**, 1 N. & M. 117 ..... Practice, 2  
**Bunney v. Poyntz**, 1 N. & M. 229 ..... Lien, 1  
**Burt v. Owen**, 1 D. P. C. 691 ..... Affidavit, 2  
**Burton v. Haworth**, 1 N. & M. 318 ..... Arrest, 1
- Capel v. Child**, 2 Tyrw. 689..... Clergy, 4  
**Cartwright v. Blackworth**, 1 D. P. C. 489 ..... Practice, 15  
 ——— v. Cox, 1 D. P. C. 529 ..... Practice, 32  
**Clark v. Manns**, 1 D. P. C. 656 ..... Practice, 40  
**Clarke v. Fell**, 1 N. & M. 244 ..... Bankruptcy, 2  
 ——— v. Imperial Gas Light Company, 1 N. & M. 206 ..... Corporation, 1  
**Clere v. Powel**, 1 M. & Rob. 228, 229 ..... Evidence, 13; Attorney, 11  
**Colebrooke v. Layton**, 1 N. & M. 374..... Clergy, 3; Practice, 7  
**Coleman v. Gibson**, 1 M. & Rob. 168 ..... Frauds, statute of, 2

- Cook v. Allen, 1 D. P. C. 676 ..... Practice, 43  
 — v. Hearn, 1 M. & Rob. 201 ..... Evidence, 10  
 — v. Stokes, 1 M. & Rob. 237 ..... Slander, 2  
 Cope v. Cope, 1 M. & Rob. 269; 5 C. & P. 604 ..... Evidence, 16  
 Corbould v. Broadhurst, 1 M. & Rob. 189 ..... Insolvent Debtor, 3  
 Creighton's bail, 1 D. P. C. 609 ..... Bail, 10
- Day v. Waldock, 1 D. P. C. 523 ..... Interpleader Act, 3  
 Deacon v. Fuller, 1 D. P. C. 675 ..... New Trial  
 Devereux v. John, 1 D. P. C. 548 ..... Interpleader Act, 5  
 Dewhirst v. Pearson, 1 D. P. C. 664 ..... Arrest, 6  
 Digby v. Alexander, 1 D. P. C. 713 ..... Peer  
 Doe d. Allen v. Blakeway, 5 C. & P. 563 ..... Limitations, Statute of  
 — d. Baggaley v. Hares, 1 N. & M. 237 ..... Trustees  
 — d. Barker v. Goldsmith, 2 Tyrw. 710 ..... Estate, 2  
 — d. Cockburn v. Roe, 1 D. P. C. 692 ..... Ejectment, 6  
 — d. Collins v. Roe, 1 D. P. C. 613 ..... Ejectment, 5  
 — d. Cooper v. Finch, 1 N. & M. 130 ..... Estate, 1  
 — d. Dalton v. Jones, 1 N. & M. 6 ..... Covenant, 1  
 — d. Gallop v. Vowles, 1 M. & Rob. 261 ..... Evidence, 15  
 — d. Jones v. Roe, 1 D. P. C. 518 ..... Practice, 27  
 — d. Knocker v. Ravell, 2 Tyrw. 719 ..... Devise  
 — d. Manning v. Hay, 1 M. & Rob. 243 ..... Practice, 51  
 — d. Martin v. Martin, 1 M. & Rob. 242 ..... Evidence, 14  
 — d. Norris v. Roe, 1 D. P. C. 547 ..... Ejectment, 3  
 — d. Pattershall v. Turford, 3 B. & Ad. 890 ..... Evidence, 1  
 — d. Rankin v. Brindley, 1 N. & M. 1 ..... Ejectment, 1; Landlord and Tenant, 1  
 — d. Shellard v. Harris, 5 C. & P. 592 ..... Attorney, 10  
 — d. Smith v. Roe, 1 D. P. C. 614 ..... Ejectment, 4  
 — d. Wingfield v. Roe, 1 D. P. C. 693 ..... Ejectment, 7  
 — v. Roe, 2 Tyrw. 724; 1 D. P. C. 495 ..... Practice, 10, 11; Ejectment, 2  
 Donellan v. Read, 3 B. & Ad. 899 ..... Frauds, Statute of, 1  
 Double v. Gibbs, 1 D. P. C. 583 ..... Court of Requests, 1  
 Dukes v. Saunders, 1 D. P. C. 522 ..... Practice, 28
- Edrupp v. Davies, 1 D. P. C. 552 ..... Practice, 34  
 Elton v. Larkins, 1 M. & Rob. 196 ..... Admission
- Fenn v. Wild, 1 D. P. C. 498 ..... Attorney, 5  
 Forbes v. Gregory, 1 D. P. C. 679 ..... Costs, 6  
 — v. King, 1 D. P. C. 672 ..... Libel  
 Forster v. Burton, 1 D. P. C. 683 ..... Practice, 44  
 Fortescue v. Jones, 1 D. P. C. 524 ..... Practice, 29  
 Fraser v. Case, 1 D. P. C. 725 ..... Practice, 47  
 Friedlander v. London Assurance Company, 1 N. & M. 30; 1 M. & Rob. 171;  
 Evidence, 4; Insurance
- Gleadow v. Aitkin, 2 Tyrw. 593 ..... Executors and Administrators  
 Godson v. Sanctuary, 1 N. & M. 52 ..... Bankruptcy, 1  
 Goodwin v. Coates, 1 M. & Rob. 221 ..... Promissory Note, 2  
 Griffiths v. Kynaston, 2 Tyrw. 757 ..... Costs, 3

Grojean v. Manning, 2 Tyrw. 725 ..... Practice, 12  
 Gurney v. Gordon, 2 Tyrw. 616 ..... Election to Parliament

Hall v. Forget, 1 D. P. C. 696 ..... Costs, 8  
 Hallett v. Aubrey, 1 D. P. C. 688 ..... Bail, 13  
 Hamlet's Bail, 1 D. P. C. 501 ..... Bail, 6  
 Harris v. Jones, 1 M. & Rob. 173 ..... Covenant, 2  
 Harrison v. Hall, 1 M. & Rob. 185 ..... Husband and Wife, 3  
 Hartley v. Cook, 5 C. & P. 441 ..... Custom ; Evidence, 7  
 Harwood v. Keys, 1 M. & Rob. 204 ..... Evidence, 11  
 Heath v. Sansom, 1 N. & M. 104 ..... Partnership  
 Heish v. Carrington, 5 C. & P. 471 ..... Principal and Factor  
 Hensworth v. Fowkes, 1 N. & M. 321 ..... Pleading, 2  
 Hicks v. Mareco, 5 C. & P. 491 ..... Pleading, 6  
 Higgs, Exp. 1 D. P. C. 495 ..... Attorney, 4  
 Hills v. Warner, 1 D. P. C. 686 ..... Evidence, 8  
 Holdsworth v. Wakeman, 1 D. P. C. 532 ..... Warrant of Attorney, 3  
 Howard v. Bartolozzi, 1 N. & M. 69 ..... Insolvent Debtor, 1  
 Hull Dock Company v. Priestley, 1 N. & M. 85 ..... Hull Dock Company

In re St. Giles and St. George's Parishes, 1 D. P. C. 540 ..... Mandamus, 2  
 — Jones, 1 N. & M. 128 ..... King's Bench Prison

Jackson v. Elam, 1 D. P. C. 515 ..... Practice, 24  
 James v. Child, 2 Tyrw. 732 ..... Attorney, 3  
 Jenner v. Clegg, 1 M. & Rob. 213 ..... Distress, 3  
 John v. Mills, 1 D. P. C. 510 ..... Practice, 20  
 Johnson's Bail, 1 D. P. C. 514 ..... Bail, 8  
 Johnson v. Popplewell, 2 Tyrw. 715 ..... Practice, 9  
 Johnson v. Smealey, 1 D. P. C. 526 ..... Practice, 30  
 Jones, Exp. In re Richardson, 2 Tyrw. 671 ..... Ship, 2

Kelly v. Dickenson, 1 D. P. C. 537. 546 ..... Prisoner, 1, 2  
 Kennedy v. Lord Oxford, 1 D. P. C. 613 ..... Practice, 37  
 Kerswill v. Bishop, 2 Tyrw. 602 ..... Ship, 1  
 King v. Burt, 1 N. & M. 262 ..... Attorney, 1  
 — v. Skeffington, 1 D. P. C. 686 ..... Pleading, 3  
 —'s Bail, 1 D. P. C. 509 ..... Bail, 7  
 Kirk v. Strickwood, 1 N. & M. 275 ..... Promissory Note, 1  
 Kirton v. Wood, 1 M. & Rob. 253 ..... Account stated

Ladbroke v. Hewett, 1 D. P. C. 488 ..... Bail, 3  
 Lamey v. Bishop, 1 N. & M. 332 ..... Practice, 6  
 Larken v. Bovill, 2 Tyrw. 746 ..... Practice, 13  
 Lees v. Marton, 1 M. & Rob. 210 ..... Evidence, 12  
 Lefevre v. Boyle, 3 B. & Ad. 877 ..... Parties to Action, 1  
 Linley v. Bates, 2 Tyrw. 753 ..... Costs, 2

Maffey v. Godwyn, 1 N. & M. 101 ..... Arbitration, 1  
 Manville v. Manville, 1 D. P. C. 544 ..... Warrant of Attorney, 1  
 Marryott v. Clapp, 1 D. P. C. 701 ..... Costs, 9

Marshall v. Barkworth, 1 N. & M. 279 .....	Bankruptcy, 3
Martin v. Martin, 3 B. & Ad. 934 .....	Warrant of Attorney, 1
Mayer v. Jadis, 1 M. & Rob. 247 .....	Bill of Exchange
Miles v. Inhabitants of Bristol, 3 B. & Ad. 945 .....	Practice, 1
Miley v. Walls, 1 D. P. C. 648 .....	Judge, 1
Milne v. Wood, 5 C. & P. 587 .....	Sheriff, 1
Morgan v. Morgan, 1 D. P. C. 611 .....	Arbitration, 3
Morland v. Chitty, 1 D. P. C. 520 .....	Interpleader Act, 2
Morris v. Evans, 1 D. P. C. 657 .....	Practice, 41
—— v. Gardner, 1 D. P. C. 525 .....	Consistory Court
—— v. Lotan, 1 M. & Rob. 233 .....	Abatement
Muir v. Smith, 2 Tyrw. 742 .....	Bail, 1
Nanney v. Kenrick, 1 D. P. C. 609 .....	Practice, 36
Newton v. Peacock, 1 D. P. C. 677 .....	Court of Requests, 2
Owen, Exp. 1 D. P. C. 511 .....	Attorney, 6
Parker v. Ade, 1 D. P. C. 643 .....	Practice, 38
Pearcy v. Fleming, 5 C. & P. 503 .....	Witness, 7
Pearson v. Coles, 1 M. & Rob. 206 .....	Practice, 48
Pedler v. Paige, 1 M. & Rob. 258 .....	Witness, 5
Pierce v. Davidson, 1 D. P. C. 496 .....	Lords' Act
Poole v. Pembrey, 1 D. P. C. 698 .....	Practice, 46
Poynter v. Buckley, 5 C. & P. 512 .....	Distress, 2
Price v. Easton, 1 N. & M. 293 .....	Pleading, 1
Reading v. Menham, 1 M. & Rob. 234 .....	Contract
Rex v. Attwood, 1 N. & M. 286 .....	Corporation, 2
—— v. Birnie, 1 M. & Rob. 160 .....	Magistrate, 2
—— v. Boulton, 5 C. & P. 537 .....	Indictment, 7
—— v. Briscoe, 1 D. P. C. 520 .....	Witness, 2
—— v. Byerdike, M. & Rob. 179 .....	Indictment, 3
—— v. Churchwardens, &c. of St. Martin in the Fields, 3 B. & Ad. 908 ..	Vestry
—— v. Cording, 1 N. & M. 35 .....	Pawnbrokers' Act
—— v. Crick, 5 C. & P. 508 .....	Indictment, 5
—— v. East India Company, 1 N. & M. 335 .....	East India Company
—— v. Edward, 1 M. & Rob. 257 .....	Robbery
—— v. Ellicombe, 1 M. & Rob. 260; 5 C. & P. 522 ....	Notice to Produce, 2
—— v. Enoch, 5 C. & P. 539 .....	Homicide
—— v. Evans, 5 C. & P. 553 .....	False Pretences
—— v. Haughton, 5 C. & P. 555 .....	Arson
—— v. Howard, 1 M. & Rob. 187 .....	Public Offices
—— v. Hungerford Market Company 1 N. & M. 112 ..	Hungerford Market Com- pany
—— v. Hemp, 5 C. & P. 468 .....	Indictment, 4
—— v. Inhabitants of Clixby, 1 N. & M. 118 .....	Settlement, 7
—— v. ——— Coningsby, 1 N. & M. 199 .....	Settlement, 9
—— v. ——— Lydlinch, 1 N. & M. 33 .....	Settlement, 6
—— v. ——— Luxborough, 1 D. P. C. 528 .....	Practice, 31
—— v. ——— Mattersey, 1 N. & M. 41 .....	Settlement, 8

Rex v. Inhabitants of Ormesby, 1 N. & M. 27	Settlement, 3
— v. ———— Osset-cum-Gawthorpe, 1 N. & M. 21	Settlement, 2
— v. ———— Padstow, 1 N. & M. 9	Evidence, 3
— v. ———— Penryn, 1 N. & M. 74	Settlement, 5
— v. ———— Rickinghall, Superior, 1 N. & M. 47.	Settlement, 4
— v. ———— Threlkeld, 1 N. & M. 14	Settlement, 1
— v. Jones, 1 N. & M. 78	Indictment, 1
— v. Justices of Cambridgeshire, 3 B. & Ad. 887	Overseers, 1
— v. ———— Essex, 3 B. & Ad. 941; 1 D. P. C. 539	Overseers, 3; Session, 2
— v. ———— Hertfordshire, 1 N. & M. 331	Session, 1
— v. ———— Middlesex, 3 B. & Ad. 938	Public House
— v. ———— Norfolk, 1 N. & M. 67	Overseers, 4
— v. ———— Salop, 3 B. & Ad. 910	Overseers, 2
— v. ———— Somerset, 1 N. & M. 252	Friendly Societies
— v. ———— Staffordshire, 1 D. P. C. 484, 507	Certiorari; Overseers, 5
— v. Kelsey, 1 D. P. C. 481	Costs, 4
— v. Lewis, 1 D. P. C. 531	Highways
— v. Maffey, 1 D. P. C. 538	Practice, 33
— v. Mayor and Aldermen of London, 1 N. & M. 285	Mandamus, 1
— v. Minshull, 1 N. & M. 277	Beer Act
— v. Oakley, 1 N. & M. 58	Forcible Detainer
— v. Page, 1 D. P. C. 507	Pauper, 2
— v. Pempraze, 1 N. & M. 312	Practice, 5
— v. Pinney, 3 B. & Ad. 947	Magistrate, 1
— v. Pratley, 5 C. & P. 533	Larceny
— v. Richards, 1 M. & Rob. 177	Indictment, 2
— v. Shadbolt, 5 C. & P. 504	Wounding
— v. Sloman, 1 D. P. C. 618	Witness, 1
— v. Smith, 1 M. & Rob. 256	Burglary
— v. Smyth, 1 M. & Rob. 155	Husband and Wife, 2
— v. St. Katharine's Dock Company, 1 N. & M. 121	Arbitration, 2; Joint Stock Company, 2; Practice, 3
— v. Tremaine, 1 N. & M. 194	Poor Rate, 2
— v. Tubby, 5 C. & P. 530	Evidence, 17
— v. Wilkins, 1 D. P. C. 536	Pauper, 1
— v. Wood, 1 D. P. C. 509	Witness, 1
— v. Woolcock, 5 C. & P. 516	Indictment, 6
Richards v. Cohen, 1 D. P. C. 534	Costs, 5
Ridley v. Gyde, 1 M. & Rob. 197	Witness, 4
Roberts v. Macord, 1 M. & Rob. 230	Easement
Robson v. Rolls, 1 M. & Rob. 239	Trover
Rubery v. Stevens, 1 N. & M. 182	Landlord and Tenant, 2
Ruddick v. Simmons, 1 M. & Rob. 184	Certificate for Immediate Execution, 2
Saunders v. Aston, 3 B. & Ad. 881	Patent
Saville v. Sweeny, 1 N. & M. 254	Slander, 1
Scott v. Henley, 1 M. & Rob. 227	Sheriff, 2
— v. Newington, 1 M. & Rob. 252	Lien, 2
Scotts v. Seager, 1 M. & Rob. 244	Court of Requests, 3

Seager v. Billington, 5 C. & P. 456 .....	Debtor and Creditor
Senior, Exp. 1 D. P. C. 517 .....	Attorney, 8
Seward v. Williams, 1 D. P. C. 528 .....	Interpleader Act, 4
Sheppard v. Shum, 2 Tyrw. 742 .....	Process, 1
Shipton v. Shipton, 1 D. P. C. 518 .....	Warrant of Attorney, 2
Short v. Cunningham, 1 D. P. C. 662 .....	Arrest, 5
Shuttleworth v. Nicholson, 1 M. & Rob. 254 .....	Counsel
Siddall v. Rawcliffe, 1 M. & Rob. 263 .....	Promissory Note, 3
Smith v. Crump, 1 D. P. C. 519 .....	Practice, 26
— v. Goodwin, 1 N. & M. 371 .....	Distress, 1
— v. Macdonald, 1 D. P. C. 688 .....	Process, 3
— v. Wilson, 1 D. P. C. 545 .....	Attorney, 9
Smith's bail, 1 D. P. C. 499, 514 .....	Bail, 5, 9
Snowball v. Goodricke, 1 N. & M. 234 .....	Evidence, 5
Soulby v. Smith, 3 B. & Ad. 929 .....	Joint Stock Company, 1
Spiry v. Webster, 1 D. P. C. 696 .....	Costs, 7
Stacey v. Fieldsend, 1 D. P. C. 700 .....	Prisoner, 4
Storr v. Bowles, 1 D. P. C. 516 .....	Practice, 25
Stothert v. Goodfellow, 1 N. & M. 202 .....	Bond
Stout v. Smith, 1 D. P. C. 506 .....	Practice, 19
Stovin v. Taylor, 1 N. & M. 250 .....	Costs, 1
Sturgess v. Claude, 1 D. P. C. 505 .....	Interpleader Act, 1
Sutton v. Lord Cardross, 1 D. P. C. 511 .....	Practice, 21
Swain v. Shepperd, 1 M. & Rob. 223 .....	Parties to Action, 2
Thomas v. Marsh, 5 C. & P. 596 .....	Trespass
Thompson v. Blackhurst, 1 N. & M. 266 .....	Judgment
Thomson's bail, 1 D. P. C. 497 .....	Bail, 4
Thornton v. Place, 1 M. & R. 218 .....	Work and Labour
Thorpe v. Hook, 1 D. P. C. 494, 501 .....	Practice, 17, 18
Travis v. Collins, 2 Tyrw. 726 .....	Evidence, 6
Twist v. Johnson, 1 M. & Rob. 259 .....	Notice to Produce, 1
Vaux v. Vollans, 1 N. & M. 307 .....	Clergy, 2
Veal v. Nichols, 1 M. & Rob. 248 .....	Stamp
Wagstaff v. Wilson, 1 N. & M. 4 .....	Evidence, 2
Wake v. Lock, 5 C. & P. 454 .....	Witness, 6
Walker v. Rawson, 1 M. & Rob. 250 .....	Payment into Court
Wardle v. Nicholson, 1 N. & M. 355 .....	Attorney, 2
Warner v. Potchett, 3 B. & Ad. 921 .....	Land-tax
Watson v. Williamson, 1 D. P. C. 607 .....	Affidavit, 1
Watts, Exp. 1 D. P. C. 512 .....	Attorney, 7
Whalley v. Barnet, 1 D. P. C. 607 .....	Judge, 3; Practice, 35
White v. Stratton, 1 D. P. C. 550 .....	Escape
Whitworth v. Smith, 1 M. & Rob. 193 .....	Trover, 1
Williams v. Davis, 1 D. P. C. 647 .....	Practice, 39
— v. Smith, 1 D. P. C. 703 .....	Prisoner, 5
— v. Smith and Wife, 1 D. P. C. 632 .....	Husband and Wife, 1
Willis v. James, 1 D. P. C. 498 .....	Practice, 16
Willson v. Davenport, 5 C. & P. 531 .....	Replevin



Wilson v. Mokler, 1 D. P. C. 549 .....	Prisoner, 3
Wilson's Bail, 1 D. P. C. 614 .....	Bail, 11
Wood v. Pringle, 1 M. & Rob. 277 .....	Practice, 49
— v. Moseley, 1 D. P. C. 513 .....	Practice, 22
Woosman v. Wood, 1 D. P. C. 681 .....	Bail, 12
Wray v. Earl of Egremont, 1 N. & M. 188 .....	Landlord and Tenant, 3
Wright v. Wilson, 1 M. and Rob. 207 .....	Sale

---

**EQUITY.**

Aberdeen v. Newland, Sim. 281 .....	Incumbrances, 2
Attorney-General v. Ellison, Sim. 236 .....	Practice, 1
— v. The Mayor and Corporation of Carlisle, 275 .....	Information
Carrington v. Cornock, Sim. 217 .....	Tithes, 1
Drayson v. Pocock, Sim. 283 .....	Vendor and Purchaser
Earl of Portmore v. Taylor, Sim. 182 .....	Reversionary Interest, 1, 2
King v. Hamlet, Sim. 223 .....	Injunction
Lloyd v. Trimlestown, Sim. 296 .....	Jurisdiction
Pearson v. Carden, Sim. 220 .....	Interpleader
Phelps v. Sproule, Sim. 318, 321 .....	Demurrer, 1, 2
Poole v. Terry, Sim. 294 .....	Legacy
Robertson v. Lubbock, Sim. 161 .....	Plea
Rowe v. Anderson, Sim. 267 .....	Bankrupt
Tucker v. Wilkins, Sim. 241 .....	Practice, 2 ; Tithes, 2
Williams v. Cradock, Sim. 313 .....	Incumbrances, 1

**BANKRUPTCY.**

- Aberdeen, Exp. D. & C. 34.....Assignees, 2  
 Anjer, Exp. D. & C. 67. ....Practice, 14  
 Anjer, (John) Exp. D. & C. 67. ....Fiat, 7  
 Anonymous, D. & C. 140.....Practice, 16  
 Amsby, Exp. D. & C. 119, 140, 192, 212.....Practice, 15, 16, 17, Evidence, 3  
 Ashton, Exp. D. & C. 5.....Consignor and Consignee  
  
 Bacon, Exp. D. & C. 181 .....Mortgage, 2  
 Baldock, Exp. D. & C. 60 .....Waiver  
 Bellwood, Exp. D. & C. 37. ....Evidence, 2  
 Booth, Exp. D. & C. 59.....Pledge  
 Bowden, Exp. D. & C. 182 .....Assignees, 4  
 Bright, Exp. D. & C. 8 .....Dividend  
  
 Christy, Exp. D. & C. 155 .....Proof, 8  
 Clarke, Exp. D. & C. 90.....Witness  
 Clarke, Exp. D. & C. 86, 194.....Practice, 12; Supersedeas, 6  
 Cotesworth. Exp. M. & B. 92.....Proof, 2  
 Cradock, Exp. M. & B. 264 .....Fiat, 5  
 Cutting, Exp. D. & C. 3.....Petition, 1  
  
 Drake, Exp. D. & C. 91, 92.....Supersedeas, 4; Election  
 Edwards, Exp. M. & B. 84, 255.....Practice, 1  
 Ellis, Exp. M. & B. 249.....Partner, 1; Practice, 6  
  
 Falar, Exp. M. & B. 87, 262 (notes). ....Practice, 2  
 Fletcher, Exp. D. & C. 90. ....Practice, 13  
 Fox, Exp. M. & B. 264.....Fiat, 4  
 Forster, Exp. M. & B. 87, 262 (note) .....Practice, 2  
  
 Grazebrook, Exp. D. & C. 186 .....Partner, 2; Petition, 4  
 Green, Exp. D. & C. 20, 42, 85, 113.....Solicitor, 1; Practice, 10; Petition, 3  
 ——— Exp. M. & B. 90. ....Acquiescence, 2; Proof, 10  
 Goss, D. & C. 242.....Usury  
 Gwyn, Exp. D. & C. 12.....Usury, 1  
  
 Hamilton, Exp. D. & C. 129.....Supersedeas, 3  
 Harris v. Tippet, 2 Campb. 637.....Evidence, 4  
 Heath, Exp. M. & B. 116.....Practice, 3, 4, 5  
 Hicks, Exp. M. & B. 256. ....Solicitor, 2  
 Hilsby, Exp. M. & B. 79.....Prisoner  
 Hornby, Exp. M. & B. 1.....Acquiescence, 1  
  
 In re Hambden, D. & C. 209.....Practice, 1

In the matter of Applegath, D. & C. 101.....	Assignees, 3
————— Dowell, M. & B. 264.....	Fiat, 3
————— Edwards, M. & B. 263.....	Fiat, 1
————— Freaks, M. & B. 215.....	Bankrupt, 1, 2
————— Hall, D. & C. 44.....	Certificate, 3
————— Moody, D. & C. 210.....	Fiat, 8
————— Rudd, M. & B. 264 .....	Fiat, 2
————— Wilkinson, D. & C. 112 .....	Assignees, 1
James, Exp. M. & B. 262 (notes) .....	Practice, 8
Jeffreys, Exp. D. & C. 86.....	Practice, 11
Laforest, D. & C. 199 .....	Proof, 11
Latour, Exp. M. & B. 89 .....	Supersedeas, 1
Leonard, Exp. D. & C. 182 .....	Fiat, 6
Luck, Exp. M. & B. 268 .....	Supersedeas, 2
Lupton, Exp. D. & C. 136 .....	Supersedeas, 5
Marshall, Exp. M. & B. 242 .....	Proof, 6
Moore, Exp. D. & C. 7 .....	Petition, 2
Morley, Exp. D. & C. 50 .....	Evidence, 1
Morley and another, Exp. D. & C. 155 .....	Proof, 7
Moult, Exp. M. & B. 28, 262.....	Proof, 1 ; Certificate, 2
Munk, Exp. D. & C. 120 .....	Bankrupt, 4
Myers, Exp. M. & B. 229 .....	Proof, 5
Part, Exp. D. & C. 1 .....	Consolidation
Pearse, M. & B. 262 .....	Certificate, 1
Pigeon, Exp. D. & C. 118 .....	Mortgage, 1
Potherbridge, Exp. M. & B. 161 .....	Allowance
Rafferstein, Exp. M. & B. 84—285 .....	Practice, 1
Robinson, Exp. D. & C. 110 .....	Mortgage, 4
Sambourne, Exp. D. & C. 22 .....	Commission
Saxe, Exp. M. & B. 134 .....	Proof, 3
Skiff, Exp. D. & C. 88 .....	Proof, 9
Smith, Exp. M. & B. 203 ; D. & C. 60 .....	Bankrupt, 3 ; Mortgage, 3
Tennyson, Exp. M. & B. 67 .....	Reputed Ownership, 1
Thompson, Exp. M. & B. 219 .....	Proof, 4
Wake, Exp. M. & B. 295 .....	Solicitor, 3
Wiggins, Exp. M. & B. 168 .....	Reputed Ownership, 2
Wilkinson, Exp. M. & B. 257 .....	Practice, 7
Williamson, Exp. M. & B. 266 (note) .....	Solicitor, 4
Worth, Exp. D. & C. 4 .....	Practice, 9
Wucheres, Exp. D. & C. 27 .....	Assignment
Wyatt, Exp. D. & C. 211 .....	Practice, 18

## ABSTRACT OF PUBLIC GENERAL STATUTES.

### (3 WILLIAM IV.)

CAP. 1.—An Act to apply certain Sums to the service of the Year One Thousand Eight Hundred and Thirty-three. [29th March, 1833.]

CAP. 2.—An Act for raising the Sum of Twelve Millions by Exchequer Bills, for the service of the Year One Thousand Eight Hundred and Thirty-three. [29th March, 1833.]

CAP. 3.—An Act for continuing to his Majesty until the Fifth Day of April One Thousand Eight Hundred and Thirty-four, certain Duties on Sugar imported into the United Kingdom, and for one Year certain Duties on Personal Estates, Offices, and Pensions in England, for the service of the Year One Thousand Eight Hundred and Thirty-three.

[29th March, 1833.]

CAP. 4.—An Act for the more effectual suppression of Local Disturbances and dangerous Associations in Ireland. [2d April, 1833.]

CAP. 5.—An Act for punishing Mutiny and Desertion; and for the better Payment of the Army and their Quarters. [20th April, 1833.]

CAP. 6.—An Act for the Regulation of his Majesty's Marine Forces while on Shore. [20th April, 1833.]

CAP. 7.—An Act to indemnify such Persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments, and for extending the time limited for those purposes respectively until the Twenty-fifth Day of March one Thousand Eight Hundred and Thirty-four, to permit such Persons in Great Britain as have omitted to make and file Affidavits of the execution of Indentures of Clerks to Attornies and Solicitors to make and file the same on or before the First Day of Hilary Term, One Thousand Eight Hundred and Thirty-four, and to allow Persons to make and file such Affidavits, although the Persons whom they served shall have neglected to take out their annual certificates. [6th May, 1833.]

CAP. 8.—An Act to amend an Act for the conveyance of certain Premises situate between London Bridge and the Tower of London.

[6th May, 1833.]

CAP. 9.—An Act for Incorporating the Members of a Society, commonly called "The Seaman's Hospital Society," and their Successors, as therein is mentioned and provided; and for the better enabling and empowering them to carry on the charitable and useful designs of the same Society.

[6th May, 1833.]

CAP. 10.—An Act to reduce the Duty payable on Cotton Wool imported into the United Kingdom. [17th May, 1833.]

CAP. 11.—An Act for repealing the Duties and Drawbacks of Excise on Tiles. [17th May, 1833.]

**CAP. 12.**—An Act to repeal the Duties on Personal Estates, continued by an Act of the present Session of Parliament. [17th May, 1833.]

**CAP. 13.**—An Act to provide for the execution of the Duties performed by the Barons of Exchequer in Scotland in relation to the Public Revenue, and to place the management of the Assessed Taxes and Land Tax in Scotland under the Commissioners for the Affairs of Taxes.

[17th May, 1833.]

**CAP. 14.**—An Act to enable Depositors in Savings' Banks and others to purchase Government Annuities through the medium of Savings Banks; and to amend an Act of the Ninth Year of his late Majesty, to consolidate and amend the Laws relating to Savings' Banks. [10th June, 1833.]

S. 1. Any two trustees of a savings' bank may receive from any depositor, or person entitled to become a depositor, any sum of money for the purchase of immediate or deferred annuities for life or years; such annuities to be contracted for by any two of the said trustees on behalf of the commissioners for the reduction of the national debt, and to be charged on the Consolidated Fund: all sums of money paid on such account to be kept apart from the other funds of the institution, and from time to time paid into the Bank of England to the account of the Commissioners for the reduction of the National Debt.

S. 2. No such annuity to be contracted for on the life of any nominee under the age of fifteen years; nor to exceed the sum of twenty pounds, or be less than four pounds per annum granted to one individual: provided that the said trustees or commissioners or the comptroller general or assistant comptroller, may refuse to contract for any such annuity, in case they shall see sufficient grounds for so refusing: provided also that if one individual shall be possessed at any one time of an annuity granted under this act exceeding twenty pounds per annum, such annuity shall immediately be forfeited.

S. 3. Trustees may not take from a person applying to contract for the purchase of such annuity a greater fee than 2s. 6d., nor than 1s. per annum, to be applied in defraying the necessary expenses of the trustees.

S. 4. With the consent of the commissioners for the reduction of the national debt, payments may be made and annuities received at any other Savings' Bank than that at which the contract was originally entered into.

S. 5. The Commissioners of his Majesty's Treasury shall direct tables approved by them for ascertaining the value of annuities to be granted under this act.

S. 6. Persons purchasing such annuities for lives or years shall be entitled to such amount of annuity as shall be specified in the tables, according to the age of the nominee or continuance of the term.

S. 7. Fractional parts of annuities less than sixpence shall not be paid.

S. 8. Life annuities and annuities for years granted under this act, to be carried to a separate account in the books of the commissioners for the reduction of the national debt.

S. 9. Life annuitants may make further purchases on the lives of original nominees without fresh certificates.

S. 10. Amount of annuities to be certified to the Treasury and to be paid out of the Consolidated Fund.

S. 11. Time of payment.

S. 12. Bargains for annuities not to be made for fourteen days after the quarterly day of payment.

S. 13. Contracts for annuities to be sanctioned by commissioners for the reduction of the national debt before they are entered into.

S. 14. On production of proof of existence and identity of the nominee, a certificate shall be granted for payment of a life annuity.

S. 15. Annuities for terms of years to be paid without proof.

S. 16. Annuities granted under this act not to be transferrable, except in cases of insolvency or bankruptcy, and then to be purchased of the assignees by the commissioners for the reduction of the national debt.

S. 17. Annuities purchased under this act not to be liable to taxes, and to be deemed personal estate.

S. 18. If annual payments of the consideration are not kept up, or if the purchaser dies before the annuity commences, all payments made to be returned.

S. 19. Registers, receipts, certificates, &c., to be exempt from stamp duty.

S. 20. Appointment of clerks and officers.

S. 21 to 25. Relate to the management by the commissioners.

S. 26. Trustees of Savings' Banks may make rules for carrying the provisions of this act into effect, such rules to be subject to the provisions of the statute 9 Geo. 4, c. 92.

S. 27. In places where no Savings' Banks are legally established, other trustees, of whom the minister of the parish, or a resident magistrate must be one, may establish a society for the purpose of granting annuities; such society to be subject to the provisions of the 9 Geo. 4, c. 92.

S. 28. Executors or assignees of officers of Savings' Banks, to pay money due to Savings' Banks before any other debts.

S. 29. So much of the 9 Geo. 4, c. 92, as relates to withdrawing deposits and redepositing, repealed: no greater sum than £30 to be deposited by any one person in one year.

S. 30. If annual returns required by 9 Geo. 4, c. 94, s. 46, are not made, the name of the Savings' Bank is to be published in the London Gazette and county newspapers.

S. 31. The commissioners for the reduction of the national debt may require a statement of expenses from the trustees or managers of Savings Banks.

S. 32. When it appears in the annual statement that any money belonging to a Savings' Bank is in the hands of the treasurer, his certificate must accompany such annual statement.

S. 33. Rules of Savings' Banks already enrolled need not be re-enrolled.

S. 34. The provisions of the 9 Geo. 4, c. 92, and of this act, extended to Guernsey, Jersey, and the Isle of Man.

S. 35. This act to extend to Great Britain, Ireland, and Berwick-upon-Tweed, Guernsey, Jersey, and the Isle of Man.

CAP. 15.—An Act to amend the Laws relating to Dramatic and Literary Property. [10th June, 1833.]

CAP. 16.—An Act to repeal the Duties, Allowances, and Drawbacks of Excise on Soap, and to grant other Duties, Allowances, and Drawbacks, in lieu thereof. [10th June, 1833.]

CAP. 17. An Act for repealing part of an Act of the Twenty-sixth year of King George the Third, for better securing the Duties on Starch, and for preventing Frauds on the said Duties, and for making other provisions in lieu thereof. [10th June, 1833.]

CAP. 18.—An Act to apply the Sum of Six Millions out of the Consolidated Fund to the Service of the Year One Thousand Eight Hundred and Thirty-Three. [18th June, 1833.]

CAP. 19.—An Act for the more effectual Administration of Justice in the office of a Justice of the Peace in the several Police Offices established in the Metropolis, and for the more effectual prevention of Depredations on the River Thames and its vicinity, for Three Years.

[18th June, 1833.]

CAP. 20.—An Act to indemnify Witnesses who may give evidence before either House of Parliament touching the charge of Bribery in the Election of Burgesses to serve in Parliament for the Borough of Stafford.

[18th June, 1833.]



## EVENTS OF THE QUARTER.

---

THE two prominent events of the last three months are the rejection of the Local Court and General Register Bills, but neither affords much room for additional remark. Both, most assuredly, will be renewed, the Local Court Bill probably much modified, and the General Register Bill pretty nearly as it stands. As to the future fate of the former we can say nothing, but there seems little doubt that the latter will pass eventually. Indeed, this much is to be collected from the remarks of the leading members of the majority, who merely contended for delay; and we are by no means sure that we should not have voted along with them upon the same principle. It is our firm conviction that both the public and the profession will be greatly benefited by the bill, but we do not see the necessity of forcing it upon them; and in the present session, moreover, there was not the slightest chance of its being properly discussed. Mr. Lynch made a good speech; the debate, with this exception, was meagre and languid in the extreme. Nothing can show more strongly how much this measure is likely to gain by discussion than the fact, that almost all the members of the Select Committee who were averse to it at first, came round to an opposite opinion in the course of the inquiry.

The other bills founded on the Real Property Reports are still pending. No new Report from the Real Property Commissioners is expected for some time to come. The proposition contained in their last Report, to transfer the testamentary jurisdiction to the equity courts, has frightened the civilians exceedingly, and at their suggestion, it is supposed, Sir James Graham has moved for and obtained a select committee to inquire into the Admiralty and Ecclesiastical Courts. Sir C. N. Tindal, Sir H. Jenner, Sir J. Nicholl, Dr. Lushington, with Messrs. Tinney, Duckworth and Tyrrel, have been examined by this committee. The principal argument urged by the learned civilians we understand to be, the expediency of keeping up their body, even in time of peace, for the sake of their services in time of war, when there may be a good deal to do in the Admiralty; for which purpose they think it advisable that the whole jurisdiction over testamentary assets should be secured to them. We do not see any very immediate connection between the law testamentary and the law maritime, except that both are based upon the civil law; and we cannot help thinking, that, if the Admiralty Courts, in time of war, were thrown open, there would be no greater lack of advocates than is experienced at present in the Cockpit. We are not aware how they get over the objection, that they have no machinery adapted for the jurisdiction they require.

Lord Brougham has brought in three bills of some importance, besides the Local Court Bill. The object of the first is to transfer the jurisdiction of the minor ecclesiastical jurisdictions to the diocesan courts, and his Lordship availed himself of the occasion to pour forth a lamentation over his lost Local Court Bill. His Lordship, strange to say, took no notice whatever of the proposition made by the Real Property Commissioners for transferring the jurisdiction of both minor and diocesan courts to the courts of equity; this plan, however, does not presuppose the creation of local courts.

His second bill gives a concurrent jurisdiction in cases of insolvency to the Court of Review in bankruptcy, the judges of which, as his Lordship truly observed, have some time upon their hands. He forgot to add, that his Court of Review is the only part of the new system which may be fairly said to have originated with himself.

His third bill embodies a proposition, already noticed, for the separation of the political and judicial duties of the Chancellorship; it also creates a new equity judge, and a new court of appeal in equity, to consist of the Lord Chancellor, the Master of the Rolls, the Vice Chancellor, and a Baron of the Exchequer. Admitting that some measure of the sort may be called for eventually, it strikes us that this is not the proper time nor exactly the proper mode of effectuating them. For reasons stated in a former Number, we cannot consent to ease the Chancellor of his judicial duties until he has fairly completed the reform of his court; and the reasons urged in 1830 (by Henry Brougham, Esq., M.P., in particular,) against Lord Lyndhurst's proposal for the appointment of an additional judge before removing the admitted abuses of the Equity Courts, appear to us to be just as applicable to Lord Brougham's. Again, to make the Exchequer a thoroughly effective Court of Common Law, or even to retain it permanently in that position to which the splendid judicial qualities of the present Chief Baron have elevated it, the equitable part of its jurisdiction must cease;<sup>1</sup> in which case a baron would be a very unfit member of an Equity Court of Appeal. Lastly, we are told that "the change would leave the Chancellor very nearly the same labour as was required by the office at present, although he would be relieved in some respects from particular duty."<sup>2</sup> If this be so, it is to be feared that his attendance on the New Court of Appeal would be rather irregular, though, considering the probable qualifications of a political Chancellor, we do not know that his absence would be felt. It will be time enough to talk about the salary when the bill shall be adopted by the legislature. Ever since the increase of his retiring pension, one is tempted to look with suspicion at all that falls from the Chancellor on this subject; and yet, to say truth, it is the only instance on record of his having ever seemed to suffer a pecuniary motive to influence him.

The Chancery Regulation Bill is still pending. It has been submitted to a Select Committee, before whom the Master of the Rolls underwent a long examination as to its provisions. The examination was private, but it is rumoured that his evidence was decidedly adverse to the bill as it originally stood, and some curious scenes are said to have taken place in the Committee-room. The Chancellor complains that the bill has suffered considerably, and as the clerks in court will be little (if at all) affected, and the present most objectionable mode of taxing costs will remain, the complaint is not a groundless one.

An important body of evidence relating to the administration of justice in India, has been published by order of Parliament, but no important changes in this department of Indian affairs is contemplated, though very sweeping ones are recommended by most of the examiners.

Mr. D. W. Harvey has made a fresh attempt (or rather make-believe of an attempt) to get admitted to the Bar. The Benchers of the Inner Temple, at his request, appointed the 7th June last for a rehearing of his case, and agreed to the admission of two short-hand writers, one on behalf of Mr. Harvey and one on

---

<sup>1</sup> In his great Law Reform Speech of 1828, Lord (then Mr.) Brougham strongly pressed the expediency of this alteration.

<sup>2</sup> The Lord Chancellor's Speech on introducing the Bill.

behalf of the Inn; but they refused to make the hearing a public one. Thereupon Mr. Harvey declined going on with his claim, and has since addressed a letter to the newspapers, offering to submit the matter to the first seven members of parliament, or the first seven members of certain public bodies specified by him, whose names shall be taken from the glasses. This is about as reasonable as if a thief convicted at the Old Bailey were to propose referring the matter to arbitration. If the electors of Colchester can still persuade themselves, that two distinct juries, two distinct sets of parties and witnesses, the whole of the Benchers of the Inner Temple, and the twelve Judges of England, are all in a conspiracy to prevent their worthy representative from ruining the rest of the Bar by attracting all the business to himself, they must be the most credulous body of constituents in these realms.<sup>1</sup> The mode of calling to the Bar will form the subject of the next Common Law Report. The subjects of costs and evidence are also under consideration.

A commission has been named to investigate and report on the present state of the criminal law. We understand that Messrs. Starkie, Ker, Whiteman, Amos and Austin (the professors) are the commissioners.

Law Lectureships are on the increase. Two are about to be established by the Benchers of the Inner Temple, and the Incorporated Law Society is also about to institute one.

A great many important Bills are pending, but of these our readers have had due notice from the newspapers. The principles of almost all of them have been discussed in former Numbers of this work.<sup>2</sup>


Mr. J. J. Park, Professor of English Law and Jurisprudence at King's College has died within the last three months. He was the son of Mr. Thomas Park, a literary man of merit still living, and was educated, we believe, at a private school. He was not a member of either of our universities, but appears to have devoted the time usually spent at them to antiquarian and general literature. At a very early age he published the History of Hampstead, a highly creditable production in its way, though the only parts likely to interest the general reader are those containing accounts of the celebrated men who have made Hampstead their place of residence. His second publication was a pamphlet on the Commutation of Tithes, which subsequently led to his being employed to draw up a bill for the purpose. We are not aware at what precise period he first seriously applied himself to law, but he could not have been much past 21 when he became a pupil of Mr. Preston, by whom he was very highly esteemed. In the preface to the second volume of Mr. Preston's work on Conveyancing, will be found an acknowledgment of assistance received in the formation of the index from Mr. Park. In 1819 appeared his well-known work on the Law of Dower, which has ever since been held the standard book on that head of law; which, by the way, he was always a strong advocate for remodelling. In 1828 he published his *Contre-Projet* to the Humphreysian Code, and in 1830 the first of a Series of Juridical Letters, under the signature of Eunomus, which never extended beyond three. The merits of these publications have been already discussed in this Magazine; their sale was very limited, but they gained the writer a defined and highly respectable position amongst the best writers on the science of law, and led to his appointment (in 1831) to the Professorship already mentioned. Though he laboured unremittingly to discharge the duties of it, and perhaps sacrificed his life to his conscientiousness, his success was never equal to his expectations; but possibly he expected more

---

<sup>1</sup> As to Mr. Harvey's case, see 8 L. M. 141.

<sup>2</sup> As to Arrest, see L. M. 70.

than the present condition of jurisprudence in this country could justify. The last time we entered his class room, the attendance was certainly good, and we have always heard him well spoken of as a lecturer. Subsequently to his becoming Professor, he published two or three of his lectures in the pamphlet shape, and also put forth a work entitled "*Dogmas of the Constitution*," a book possessing little merit of any kind. It is a mistake, however, to suppose that he published it with the view of ingratiating himself with the patrons of King's College; the opinions had long been honestly his own, and he was incapable of making himself the tool of any party. The character of his mind and acquirements must be already well known to our readers from the frequent mention we have made of him. These were exactly such as might have been anticipated in a self-taught man of vigorous intellect, confined (by deafness) to the narrow circle of domestic society. He possessed great powers of original thought, and had stored up a large mass of varied knowledge; he therefore seldom applied himself to a subject without turning up something valuable and new, but his mode of presenting his discoveries, if sometimes striking from quaintness, was too often remarkable for pedantry. In one of his lectures at King's College, for example, he first goes out of his way to introduce an obscure term in Aristotle as an illustration, and then adds a long and learned explanatory note. Despite of this weakness, however, and the occasional ruggedness and inaccuracy of his style, his writings have largely contributed to diffuse a knowledge of jurisprudence in this country, and in the present state of the science his death may well be looked upon as a national loss. We must not forget to mention that about a year before his death he became a Doctor of Laws at Göttingen. This has been mentioned as a proof of his reputation abroad; the fact is, the degree is never refused to any foreign professors or writers of name who may apply for it and be willing to pay the fees, and in Mr. Park's case, as we happen to know, both these preliminaries were regularly gone through.



*Notices to Correspondents.*]—We thank A. B. Z. for his communication; he has himself stated one great objection to the plan.

We gave notice long ago that we could not answer cases; we should not shun the trouble, but it might be deemed a breach of professional etiquette.

## LIST OF NEW PUBLICATIONS.

An Elementary and Practical Treatise on the Commencement of Personal Actions, and the Proceedings therein to Declaration, in the Superior Courts at Westminster, comprising the Changes effected by the Uniformity of Process Act (2 Wm. IV. c. 39,) and recent Rules of Court; with an Appendix of the Statute, the Rules referred to, and appropriate Practical Forms. By William Atherton, Esq. of the Inner Temple, Special Pleader. In 12mo. price 6s. boards.

[A book of great merit; we shall probably give a detailed notice of it at some future time.]

The Practice of the Law in all its Departments, with a view of Rights, Injuries, and Remedies, as ameliorated by recent Statutes, Rules and Decisions; showing the Modes of Creating, Perfecting, Securing, and Transferring Rights, and the best Remedies for every Injury, as well by acts of parties themselves as by legal proceedings, and either to prevent or remove Injuries or to enforce specific Relief, or Performance, or Compensation; and showing the Practice in Arbitrations before Justices in Courts of Common Law, Equity, Ecclesiastical and Spiritual, Admiralty, and Courts of Appeal; with new practical Forms; intended as a Court and Circuit Companion. Vol. I. Part 2. By J. Chitty, Esq. of the Middle Temple, Barrister. In royal 8vo. price 18s. boards.

[Reviewed, *ante*, p. 139.]

A Practical Treatise on the Law of Tolls: and therein of Tolls thorough and traverse; Fair and Market Tolls; Canal, Ferry, Port and Harbour Tolls; Turnpike Tolls; Rateability of Tolls; Exemption from Tolls; and of Remedies and Evidence in Actions for Tolls. By Frederic Gunning, of Lincoln's Inn, Esq. Barrister at Law. In 8vo. price 9s. boards.

Practical Directions for taking Instructions for and Drawing Wills, with an Appendix of Precedents. By William Hughes, Esq. of Gray's Inn, Barrister at Law. In 12mo. price 12s. boards.

The Practice of the Court of King's Bench, and incidentally of the Common Pleas and Exchequer, in Personal Actions and Ejectments. By J. F. Archbold, Esq. of Lincoln's Inn, Barrister at Law. The Third Edition, by Thomas Chitty, Esq. of the Inner Temple. Vol. I. in 12mo. price 1l. 10s. boards.

[A greatly improved Edition of a book of acknowledged utility; on the appearance of the second volume we shall hold it our duty to give a regular review of the publication.]

Forms of Practical Proceedings in the Courts of King's Bench, Common Pleas and Exchequer of Pleas. By Thomas Chitty, Esq. of the Inner Temple. In 12mo. price 18s. boards.

[The forms appear to have been framed or selected with great care, so that the book may be taken as a highly useful companion to Mr. Chitty's Archbold.]

Cases of Controverted Elections determined in the Eleventh Parliament of the United Kingdom, being the First Session after the passing of the Reform Acts. By A. E. Cockburn, Esq. and W. Carpenter Rowe, Esq. Barristers at Law. In 8vo. Part I. 6s. sewed.

[Reviewed, *ante*, p. 146.]

The Book of Rights: or Constitutional Acts and Parliamentary Proceedings affecting Civil and Religious Liberty in England, from Magna Charta to the present Time; Historically Arranged, with Notes and Observations. By Edgar Taylor, F.S.A. In 12mo. price 6s. 6d. boards.

[The object of this book is "to supply within convenient compass many documents which are of the greatest value to English History, but must hitherto have been sought for in bulky volumes not very accessible to the general reader." The author, an able and enlightened antiquary, has fully attained this object, and produced a very valuable book. We particularly recommend it to our foreign friends, who have often commissioned us to procure them some publication of the sort.]

Observations on a Bill intituled "An Act for establishing Courts of Local Jurisdiction." By William Raines, Esq. of Lincoln's Inn, Barrister at Law.

[A pamphlet containing some strong objections well stated to particular provisions of the bill]

Lord Brougham's Local Courts Bill examined. By H. B. Denton, Esq.

[An able pamphlet, containing most of the legal objections to Local Courts and Lord Brougham's Bill.]

Second Edition of A Letter to the Lord High Chancellor, occasioned by his Lordship's recent Supercilious Allusions to the Independence and Disinterestedness of Attornies and Solicitors. By James Beaumont. London. 1833.

[We shall review this production in our next Number.]

A Practical Treatise on the Law of Evidence, and Digest of Proofs, in Civil and Criminal Proceedings. Second Edition, with considerable Alterations and Additions. By Thomas Starkie, Esq. of the Inner Temple, Barrister at Law, Downing Professor of Common Law in the University of Cambridge. In 2 vols. royal 8vo. price 3*l.* 10*s.* boards.

A Practical Treatise on the Law of Window Lights. By Humphrey W. Woolrych, of the Inner Temple, Barrister at Law. In 12mo. price 3*s.* boards.

Observations illustrating the Excellence of the Real Property Law of England. In 12mo. price 4*s.* 6*d.* boards.

New Practice of the Courts of Law at Westminster in Personal Actions commenced by Writ, on the Principle of Uniformity as reformed by the Statutes, regulated by the Rules, and expounded by the Decisions of the present Reign, including Directions for Proceeding by Summons. With an Appendix of Statutes, Rules and Forms. By George Price, Esq. of the Temple, Barrister at Law. 15*s.*

**LONDON:**  
**C. ROWORTH AND SONS, BELL YARD,**  
**TEMPLE BAR.**



# THE LAW MAGAZINE.

---

## ART. I.—OLD BAILEY EXPERIENCE.

---

*Old Bailey Experience.—Criminal Jurisprudence and the actual working of our Penal Code of Laws.—Also an Essay on Prison Discipline ; to which is added a History of the Crimes committed by Offenders in the present day. By the Author of “ The Schoolmaster’s Experience in Newgate.” London, 1833. 8vo.*

THE author of this work is an attorney, who appears to be much employed in defending prisoners at the Old Bailey. Some parts of it have already appeared in detached papers in Fraser’s Magazine, under the title of “ The Schoolmaster’s Experience in Newgate ; ” and the author states that the attention which these articles attracted and the appearance of Archbishop Whately’s Thoughts on Secondary Punishments, “ which he considers opposed to all experience on the practical results of the effects of punishment,” induced him to reconsider the entire subject, and to lay this volume before the public. The pretensions of this writer are by no means moderate : he appears to think that hitherto the world has been in a state of entire darkness on the subject of penal jurisprudence in general, and the causes of crime in London in particular ; and that he has arisen, a light to lighten the gloom, and to settle all disputes, and to overthrow all theories by his experience and practical knowledge. He is pleased to remark, in his Preface,

that "this country, which abounds with men skilled in scientific acquirements, is yet deficient of any just and true knowledge of the science of legislation." He further adds, that "the obtuseness of legislators in comprehending the proper method of treating their fellow-men is proverbial in the mouths of all persons who have mixed in that society which is calculated to impart to them a real knowledge of their own species." Nevertheless, he appears to think that this gross ignorance and incapacity of all persons in this country, who are concerned in the theory and practice of legislation, arises not from any difficulty in the subject, but from mental weakness or want of inquiry; for in another place he remarks that "it is to be lamented that we have not one general law that should embrace every object, and remedy every defect in the present statutes on the subject of the criminal jurisprudence," (p. 409,) a work which the author, judging from his own powers, seems to think of easy execution.

After placing himself on this high eminence, in the very sanctuary of political wisdom,

Despicere unde queat alios, passimque videre  
Errare, atque viam palantes querere vitæ,

the writer might naturally be expected to bring some important contribution to the theory of criminal legislation. We never however saw an instance in which the profession so greatly exceeded the performance. The author has observed many curious and interesting facts, and appears to be well acquainted with the working of our penal law in the metropolis. But he should have contented himself with recording what he had seen and heard, and should have left the inferences to be drawn by others. The moment that he ceases to narrate, and attempts to reason on a general subject, to make suggestions, and to compare different systems of punishment, he is completely out of his depth, and merely overlays the question with a heap of empty and verbose declamation. His *visa* have considerable value, but his *cogitata* are utterly worthless. The following is the account which he gives of his opportunities of knowledge on the subject:—

"In inquiries respecting the increase of crime, the best information is to be had from the offenders themselves. Obstacles certainly

occur peculiar to such an investigation, in the characters of the parties to be examined, and the interest the examinants would think they had in misleading the examiners. To this are to be added their faithlessness and general depravity; and as few long accustomed to crime ever seriously reform so as to take a sincere interest in the better regulation of society, little can be expected from them by any casual compunctions of conscience. Moreover, few traffickers in crime possess either education or ability to benefit the world by communicating their experience . . . . . Nearly three years experience in Newgate, and at the court where they are tried, have (has) enabled me to arrive at certain conclusions. The circumstances under which I obtained these opportunities for observation it is not necessary for me to state; suffice it to say, I was brought immediately into contact with the inmates of the prison, and that I had opportunities of seeing the prisoners in their unguarded moments—freed from all caution, and without their having had any motive for practising deception. During the period of my attendance I was employed in giving them advice, and was confidentially intrusted with their secrets for the purpose of defending them when in danger of punishment. I was, moreover, engaged as their amanuensis, both before and after their convictions, by which means I have become possessed of their true feelings, together with their standing and grade as professed thieves.”—p. 38.

In the manner here described the author has doubtless obtained much valuable information on the state of crime and the ways of criminals in the metropolis. But instead of stating the facts which had come to his knowledge in a clear and succinct manner, he has thrown together his materials in a way which sets all method at defiance; and has mixed them with so many obviously true and obviously false remarks, so many absurd speculations, and so many useless or mischievous suggestions, that we find it impossible to follow him regularly through his various wanderings, and shall only attempt to give the most valuable parts of his book in the order which seems to us most convenient.

We shall begin by the author's account of the different classes of criminals in the metropolis, who may be divided into two kinds, those who act in gangs, and those who act singly. Crime, for the most part, is now carried on in concert: the chief exceptions are highwaymen and forgers, who often commit crime without a confederate. Even single footpads, how-

ever, are now almost unheard of; and highway robbery is seldom committed except in a crowd, where a gang of fellows sometimes surround a person and rob him in the face of the bystanders. Such outrages can only be prevented by the actual presence of the police: the thieves, however, in general do not approve of violence to the person, and have a very mean opinion of any one who resorts to that expedient:

“ I had an opportunity (says the author) of seeing a remarkable instance of this last year. An Irish itinerary tinker knocked a captain of a vessel down in the neighbourhood of the London Docks, in a most brutal manner in the dark, and robbed him of his money. When the fellow was committed to Newgate, he applied to me to make out his brief. There were in the same yard where he was before his trial, nearly a hundred prisoners, one half of whom were transports, but not one of them would associate with him, in consequence of the nature of his offence; and when I went to take his instructions for making out the brief, they all called out for me not to do it, and I got some insults for having undertaken it. They afterwards led the man such a life, that he appeared to be relieved when he was condemned and sent to the cell. On the morning of this man's execution, not a word of commiseration for him, or reproach on the practice of hanging, was uttered by one hundred and twenty men who followed crime as a trade. On the contrary, they all *nem. con.* said he deserved his fate.”—p. 339.

The author explains this by saying that an entire change has taken place in the character and opinions of London thieves during the last thirty years. Formerly heroic robbers were admired; desperate, daring, fool-hardy men, who occasionally even showed some bravado in their exploits, and who died on the gallows without flinching or peaching. “ All this kind of heroism has subsided; their leaders now are men rendered famous for scheming, subtlety, and astuteness. Formerly the passport to enrolment under their banners, was a name for boldness and monstrous acts of outrage; now a certificate must be brought of the man never having committed an indiscreet act in his calling, and that the party is ‘ up to all the moves upon the board, and knows something.’ This ‘ knows something’ is a sentence ever in the mouths of the thieves, and has a very extensive meaning. When an associate of a set of rogues recommends an acquaintance for

admission into their party, the first question asked by all the members is, 'What does he know?' If the answer be in the superlative degree, 'every thing, and is a good operator,' he is admitted; but if the reply be in the comparative, and 'he only knows something,' then they are very cautious, even should the party be admitted, of entrusting him with all their movements: nor will they allow him what they call *regulars*; that is, a fair proportion of the plunder. This is done by an understanding among the rest."—p. 341.

It is curious to observe how civilization advances, not so much by extinguishing crime, as by substituting less for more mischievous offences, and by raising the standard of morality even among the professed thieves. For fraud is, undoubtedly, less injurious to society than force; and it is a great gain that open violence should be viewed by malefactors with dislike. We suspect that a very different feeling would prevail on this subject in an Irish gaol.

As to *forgers*, the author states his belief that nearly all forgeries on bankers and merchants are committed by persons whose minds are in a state of despair, either caused by unavoidable misfortunes, or more frequently by wild and ill-judged speculations. Sometimes likewise forgery is committed to repair losses occasioned by extravagance, or gambling. The author thinks that "no penal laws will ever be effective in suppressing this crime;" whence he approves of the late abolition of the capital punishment for forgery: he ought, in justice to his premises, to have gone further, and have recommended the abolition of all punishment whatever. The forgery of drafts and checks might, he thinks, be prevented by a contrivance of signs arranged between the banker and his customers; as to the forgery of bank-notes, he sees no mode of lessening it, until the notes are made more difficult of imitation.—p. 418.

Another crime, rarely committed in concert, is *embezzlement*, that is, theft by a servant of money entrusted by the master to his charge. The author says, that when it is considered what immense sums of money are daily transmitted through the hands of clerks, shopmen, apprentices, and even porters, it is creditable to the morals of that class of persons in the metropolis, that so few cases of embezzlement should

occur at the Old Bailey. He adds, however, that more cases of this kind of crime are either forgiven or compounded than any other offence: forgiven, either from kindness for an old servant, or respect for his family; compounded, for the sake of recovering the stolen property.—p. 419.

Of the criminals who act in concert, the *housebreakers* are the most formidable, though not the most numerous class. London is their centre of action, and furnishes the greatest number of opportunities for burglary; but they diverge from it in all directions into the country in search of plunder, many of them taking journeys as regularly as the servants of any mercantile house in the city of London. They do not, however, like the wandering pickpockets, make circuits, but go direct for some specific purpose; frequently they receive information from an inmate of the house intended to be robbed, or an agent living near the spot. Persons are likewise employed to travel about the country for the purpose of establishing connexions with the loose characters in towns, and collecting information as to opportunities for committing robberies. These travellers are well supplied with money, and are usually accompanied with a well-dressed female, who may serve both as a lure and an accomplice. The author states, that he recently heard of a person of this description, who carried with him in his chaise a case of housebreaking instruments, which might be used if a chance of committing a robbery should occur before hands could be sent from London, and that he was favoured with a sight of this case. "I had not (he continues) time to count the number, or to view the various kinds and purposes to which the instruments were applicable, but I guess there were from sixty to seventy in the whole; most of them appeared to be designed for lock-picking, with some few for forcible entry. When I saw the case it was in the hands of a carpenter, who had it for a short time to make some alteration in the interior fittings-up. He informed me that the whole was made at a cost of 150*l.*, and that if a door was not bolted or barred, there was no lock made which would resist these instruments in skilful hands." Generally, however, when information is obtained of a favourable opportunity of a robbery, one of the London gang is sent down to reconnoitre the ground, and to arrange the plan of attack, while the others follow in a chaise.

or chaise-cart. These persons contrive to reach the scene of action at the very time appointed for the robbery, so that they are not seen lurking in the neighbourhood before the crime is committed. One of the party then drives with all possible speed to London with the stolen goods; and these are carried to the house of a confederate, who had no concern in the actual robbery, and who keeps a shop in order to conceal his real employment. The utmost caution is observed in communicating with the receiver; the burglar never goes to his house after he has conveyed the stolen goods to it, and sometimes even this transmission is effected by a third party. The wealth of these persons is sometimes so great that they are enabled to keep goods for a long time, and thus avoid the risk of an immediate sale. A depository belonging to one of these persons was accidentally found about two years ago, in which there were goods which had been stolen five years before that time. Nothing, it seems, can exceed the vigilance, the wariness, and the ingenuity of the regular gang of house-breakers: the author says that they are, unquestionably, the most formidable body of malefactors in the kingdom, and that it seldom or never happens that one of them is caught; those apprehended are for the most part single adventurers, who do not act in concert with the regular practitioners. He likewise states his belief that they are more on the increase than any other class of criminals; and, as a check on the commission of burglaries, he recommends the circulation of printed notices, and the publication of a complete list of crimes in a police newspaper—an excellent plan, first suggested in an able article on police (supposed to be written by Mr. Chadwick), which appeared in the first number of the *London Review*. “The country robberies would be much lessened if persons stationed on the roads were authorized to inspect vehicles passing through their districts, particularly within twenty miles of town. The number of regular housebreakers is supposed to be about 3000 in and about the metropolis.” p. 838.

*The coiners of false money*, brought to trial at the Old Bailey, are stated by the author to be for the most part clumsy artificers, whose productions can only be passed at fairs or low gambling-tables, under favour of noise, hurry, and



confusion. Coiners of a higher description, possessed of capital and producing good imitations, on a large scale, do not often appear, and their issues are of rare occurrence. The author says that these persons can only be attacked with success through the *smasher* or the passer of bad money; who, if examined privately, might, in many cases, be induced to discover the name of the coiner. Great caution, however, is used in getting the false money into circulation, and there are often seven or eight persons between the coiner of a good counterfeit and the utterer. It seems that the coins are sold by one party to another, the buyer paying the price beforehand, on receiving the indication where they are concealed. "The utterers, like the coiners, are of two classes; one is scarcely a remove in appearance from a mendicant, and the other, men who go about in what is called a *bounceable* manner, always in a hurry, making a great show of money. They start into the country, jumping off the coach, whenever it stops in a town, to buy a pair of gloves or some other trifling article, to get one of their fictitious coins exchanged for real money. It is a very common practice of theirs to place one base coin, suppose a sovereign, with eight or ten good ones, bounce into a shop, make a small purchase, take out the whole and throw them on the counter pretending to look for change, then cast out the bad one in a careless manner, which puts the shopkeeper off his guard." These attempts are usually made when the master or mistress is absent, and a boy or girl left in charge of the shop. Coining is not considered a profitable crime: a man, however, who had been under sentence of death for this offence, showed the author a statement by which it appeared that he had in three years cleared by it 600*l.* besides his travelling expenses; but he admitted that this was a rare case, arising from his peculiar skill.—p. 349.

There are in London numerous petty thieves, called *sneaks* and *sawney-hunters*, who prowl about the streets, watching for an opportunity to snatch pieces of bacon, cheese, poultry, from which the shopkeeper withdraws his eye for a moment; and they always have a ready market for such stolen articles of food with the fruit-women in the street. The author states that these young rogues are about as numerous as all the adult offenders in London put together. Most of them are orphans

or bastard children of the poor, or children of Irish parents; the rest are legitimate children of the poor, with a few boys of more respectable parents. They frequently change the theatre of their operations; and with their district they change their lodging-house, where they meet at night in parties of fifty or a hundred, and talk of nothing but their tricks and thefts. In low neighbourhoods all the boys associate together and pass the chief part of their time in the streets; hence many children begin thieving as early as five years of age; and even if they go to school, their mode of life is not much improved; the author however states, that out of 500 boys examined by him under the most favourable circumstances in which any one can be placed for ascertaining the truth, very few had been to any school for more than one or two months. Those who could read had generally learnt to read in prison. "A young one begins in the company of others a little older than himself, and who has had some previous practice, to go the rounds of the market-places, stealing apples, turnips, carrots and fruit of all kinds. By this practice they acquire patience in watching and dexterity in snatching their plunder, and as they are taken out as fags to the other boys, they soon become proficient. Success gives them confidence; they then attack shops, sneaking about the doors the whole day, and stealing all moveables coming in their way; and the instances of success within my own knowledge would astonish the most credulous. They soon find out what shops are 'good,' (their own term); that is, where the shopkeepers are most careless and the property most exposed. Of these places the whole fraternity have a knowledge; they acquaint themselves with the best hours of attack, and of every particular relating to the habits of the master and his shopmen, and when at length a place is no longer 'good' (meaning when the owner of property by repeated losses becomes cautious) the name is circulated, with more certainty than the public newspapers could do it, through the town in a few hours. Their meeting every night at the lodging-houses, and the constant changes going on from one end of the town to the other, affords them this facility of communication." Most of these children are from birth placed in such a situation as leaves them no alternative but to steal or starve; in some instances the parents either teach and employ

their children to steal, or connive at their thefts. The physical sufferings of many boys in London arising from the neglect and brutality of the parents are stated by the author to be almost past belief. "Many are lying on the mat of the door, on the stairs of their parents lodgings, half the night, waiting until they come home drunk and out of temper, when perhaps the boy is kicked into the street, there to spend the night, until at length he is driven to join the sneaks at their lodging-houses, and the next day commences thief." The great accession to the body of criminals appears to be caused by the evil example and counsels of the young offenders. The author states that a born thief will, until his twelfth year, annually seduce into crime at least ten other boys, not the sons of thieves or of persons who wish their children to be thieves, but of parents whose absence from home during the day prevents them from putting any restraint on their children or attending to their education. But between the ages of twelve and twenty he will not seduce above four or five of his own standing; whence it appears that the chances of corruption are considerably greater in childhood than at a more advanced age. He also says that the older thieves make great use of the passion of youths for the minor theatres as a means of seducing them into crime. "The men know, if a boy has a passion for these low exhibitions, that he is a sure prize. This the boys acknowledge; and full one half have confessed to me, that the low theatres have been the cause of their entering into crime, and in very many instances the offences for which they stood committed were occasioned by their want of money to gratify this passion. When they know they are about to be discharged, the first pleasure they anticipate is going to the theatre the same evening. Although turned out without hat or shoes, and in rags, they make sure of getting the money for this purpose; and I have no doubt many go from the prison-door to stealing for no other object, such is their infatuation for these places."—p. 297.

It is in the manners here described that the neglected, ill-treated or outcast children of poor parents in London are trained to habits of crime; and from this body of youthful offenders the ranks of the higher and more daring criminals are recruited when vacancies in them are produced by death.

or detection, or when fresh opportunities of successful crime present themselves. Some of the older sneaks are taken into the service of housebreakers, others join gangs of pickpockets, or are admitted to various other branches of the criminal profession; the cleverest being of course selected first. The pickpockets are quite distinct from the sneaks, and do not frequent their lodging-houses. They associate in parties of three, four or five, taking the utmost care to certify themselves of the dexterity of any new colleague whom they enlist. "When the sneak comes into the hands of the pickpocket, he is instructed and practised every hour of the day until made tolerably perfect; he is then taken into the streets, to make his first essay in the presence of those who have taught; and it has been given in evidence, that they dress up a *lay* figure, hanging bells all over it, on which they practise. When the tyro can empty all the pockets of the figure without occasioning a bell to sound, he is considered fit for the street. He generally begins with a pocket-handkerchief, whilst another takes 'ding,' that is, receives it from him. If they find a boy dull, they forthwith turn him out of their party." The qualifications for a pickpocket are a light tread, a quick sight, a delicate sense of touch, firm nerves, and a tact of observing when the attention is engaged, or of devising means to engage it himself, till the act is done. They likewise wear thin shoes, in order to prevent their footsteps from being heard. Their harvest is in foggy weather, or on days of public processions, when the streets are crowded with gaping spectators. They are said to be for the most part faithless to one another, and unsusceptible of moral reformation; the latter attribute is common, we fear, with them to all other rogues.

Shopkeepers are exposed to loss not only from the sneaks, but also from the *shoplifters*, who act in concert, the one engaging the shopman's attention, while the other secretes the goods; and the *starrers*, who rob shops from without, by breaking and afterwards removing a pane of glass.

Sheep, cattle, and horses are a species of property much exposed in this country, and are consequently not unfrequently the subjects of crime, though on the whole they appear to be efficiently protected by the law. Foreigners often wonder at the manner in which cattle in this country are left out in the

fields after sun-set. Pecchio, in his remarks on England, particularly notices the security of animals left in the fields at night without any person to watch them.\* On this subject the author says,

“There was at one time a very formidable gang of horse-stealers, who spread themselves all over the country, and for a long period carried on successfully their depredations ; but there is now no reason to suppose there is much confederacy in this crime, or, indeed, that there are any regular horse-stealers, all the instances of this offence being, like the highway robber, casual. But it is not so with sheep and cattle-stealers : Smithfield is frequented by many, who are in connexion with persons in the country, who carry on their depredations to some extent, and in various ways. There are men in the country who are in confederacy with others in town and the drovers on the road, who of course are going to and from the country constantly with large flocks of sheep or herds of cattle : the thief, availing himself of the darkness, drives into these flocks or herds the sheep or cattle belonging to other persons. In the course of a long journey this may be done at many places on the road. As they reach town, they have persons ready to separate the stolen ones and dispose of them to certain little master-butchers, who are in the secret, and consequently obtain them much cheaper than at the usual market price. The grazier and farmer suffer most with their sheep.”—p. 375.

The class of thieves who followed the trade of cutting trunks from carriages is said to be nearly extinct, on account of the improved modes of fastening now adopted. There are, however, persons who prowl about the streets, following carts and waiting for an opportunity of seizing any package within their reach, or when the carter is delivering his goods and is obliged to leave his cart for a few minutes. The author mentions some very daring thefts committed in this manner, and he adds : “Many acts of the thieves for coolness of audacity and apparent careless confidence, appear incredible in narration ; but the truth is that, like all other hazardous callings, the longer the parties remain in them, and the more miraculous escapes they have, the more confident assurance they acquire, until, like the forlorn-hope men of the regiment, they receive their death-shot at last.”—p. 424.

\* Osservazioni semi-serie di un esule sull' Inghilterra, p. 253. 264.

The tricks of the *swindlers* are endless ; the author particularly describes the fraud of advertising to raise money or discount bills to an unlimited extent, the object of the advertisers being to obtain good securities, which are converted into money, probably at half-price. He likewise mentions the trick of lower gangs of swindlers, who travel about in order to entice people to make bubble-bets : as, whether there is such a word as *infortunate* in the English language, or whether Henley is or is not on the London side of the Thames. *Duffers* are rogues of a similar description, who pretend to sell smuggled goods at a low price, and thus obtain ready money for utterly worthless articles. The practice of *ring-dropping* has been so often exposed, that we need not repeat the account of this very coarse deception.

Robbing men in a state of drunkenness (called in the thieves' slang *ramping*) is a crime of frequent occurrence in London. The man is usually decoyed by a prostitute either into some remote place, or most commonly into a house, where she is joined by one or two male accomplices, who take the property from his person. The low brothels in the neighbourhood of Drury Lane are much used for this purpose. " In almost every case of this kind the parties would rather pay as much as that which they have lost, than expose their indiscretions to the world ; besides, in most instances, the difficulty of identifying the guilty persons is very great. The prosecutor being robbed in a state of insensibility, his evidence, even if he were disposed to give it, would be received with doubt, as it is generally given with incertitude."—p. 384. Much of this evil arises from the vast number of the prostitutes in London, and the early age at which they begin their career many of them are driven to this course of life by the same causes which drive the young sneaks into crime, there being this difference in their cases, that whereas a boy, who has lost his parents or has been abandoned by them, at once takes to crime, a girl, in the same condition, has the previous resource of prostitution, by which she can obtain money, without at once embarking in a life of crime. Nevertheless, the transition from the one profession to the other is, unhappily, not very difficult ; and those girls who come upon the town at an early age, probably seldom fail to combine the

practice of thieving with prostitution. The author states that in the low brothels near Drury Lane, above alluded to, prostitutes of nine or ten years old may be seen at night. "I was in court," he also says, "at Clerkenwell last May sessions, when a girl, little more than twelve years of age, was placed at the bar for stealing some bottles. She had parents, but they heeded her not; she wept most bitterly. It seems she had been compelled to sleep in the streets for want of a home. Although so young, the court were informed that she was at that moment in a state of disease, which had only been discovered that morning. She was sentenced to two months' imprisonment." He likewise adds, that he was informed not long ago by an active and intelligent officer of the police, that in his neighbourhood, the Regent's Park, one street contains thirty-six brothels, in one of which the policeman had ascertained that forty-five girls had slept the previous night, there being several beds in the house in which six of these unfortunate young creatures slept together (p. 388). The only remedy for this evil, is the formation, on a large scale, of houses of refuge, like those which have been attended with such success in the United States (of which we intend to treat in a future number), the establishment of an efficient compulsory system of national education, and a vigilant police, armed with extensive powers.

The *receivers of stolen goods* are a numerous body of criminals in London, so numerous, indeed, that they consist of many different classes, each dealing in peculiar kind of property. The author divides them into eight kinds. 1. Buyers of bank notes. "There are probably no more than ten persons in London who carry on the trade of purchasing bank notes solely. These men are so connected that they can dispose of any notes, even after they are advertised and payment stopt at the bank, and every publicity given to the numbers, yet will they unhesitatingly buy, at a profit of 25 per cent., giving fifteen shillings for every pound, most of which are forwarded to the continent, where they are passed through a variety of hands in trading transactions, until all possibility of tracing them is removed, and in time find their way to the Bank of England for payment." 2. The *plate-receivers* keep crucibles in readiness, in order to melt any quantity of plate brought in.



They either buy the silver from the thief at 1s. 3d. an ounce under the market-price, or they charge a high price for the melting.

3. The *purchasers of jewellery and watches* are chiefly Jews, who sell them in the country, either by travelling themselves, or sending them to persons with whom they are connected.

4. *Marine store-keepers*, who purchase goods stolen from the docks and arsenals, or from other places on the banks of the Thames.

5. Women who reside in courts or in obscure places, professing to carry on washing or mangling, or keeping some little shop, as a blind. These women buy small portable articles, stolen by the young sneaks, as linen drapery, hosiery, work-boxes, tea-caddies, &c. "Their practice is to have a house or lodging away from the receiving shop, in which their husband, sister, or some other participator in the profits resides, and to which place every article is conveyed as speedily as possible after the thief is gone; very frequently it is by a back communication between the two premises." The author states that he ascertained, beyond a doubt, from convicted boys the existence of seventy-four of these places in the metropolis.

6. An inferior class of receivers for the sneaks, are the old women who keep stands in the street for the sale of fruit, &c. These women chiefly purchase articles of food, for which they give less than one-seventh of their value. The author states his belief that there is not one of these women, who makes a permanent standing in one place, but relies more on her dealings with the young sneaks for a living, than on any sale of goods at her stall.

7. "There are pawnbrokers in every low neighbourhood throughout the metropolis, whose whole business consists in receiving stolen goods in the way of pledges. I have received information of several, who are considered by the offenders to give much better prices than the regular fences, which makes them prefer pledging their booty, although there is never any intention of redeeming the goods. This the pawnbrokers know, as the thief, being every hour liable to fall into the officer's hands, usually destroys the duplicates, to prevent any second charge being brought against him."

8. Jews, calling themselves general dealers, are stated by the author to be as numerous a class of receivers as any in London. They carry on their business with great cunning and wariness, and their connexion with other persons of their

persuasion affords them peculiar opportunities of disposing of the stolen goods.—p. 414.

Having now followed the writer through his account of the different classes of criminals in the metropolis, we will next pass to the constitution and proceedings of the Court of the Old Bailey, where these offenders are tried when committed by the magistrates. As the author's statements on the subject of this court, and the manner in which the business of it is conducted, are highly criminatory, we shall, as far as possible, give his remarks in his own words.

“ The Old Bailey court is under the jurisdiction of the Lord Mayor and the Court of Aldermen, one of whom must be on the bench to complete a court. This body elects the Judges, consisting of the Recorder and Common Serjeant, who have an assistant judge, now Serjeant Arabin, all of whom are in daily intercourse with the other city authorities. Throughout the year, meetings out of number take place on city business, besides dinner and convivial parties, at which the aldermen and other gentlemen of city influence are constantly in the habit of meeting these judges on the familiar terms of intimates: consequently, through these channels any representation may be made to a judge before trial, either for or against the prisoner. Tales may be poured into his ears, day after day, in various ways, so that the judge himself shall not see the motive, until a prejudice be effected which renders him unfit for his office. It may be asked, what motive any of these gentlemen can have in prejudicing the case of a prisoner? I answer, none personally; but when it is considered they have all been in trade, and have numerous connections, either commercial or otherwise, in all the grades immediately below their own, and looking at all the ramifications by which society is linked together, especially in this metropolis, it is easy to conceive that through such channels claims will be made on them not always to be resisted, and from them to the judge. That they do interfere I know, as do all others any way connected with the court or prison. . . . In every session there is a small class of prisoners very opposite from the regular thief, consisting of clerks, and others in a similar walk of life, many of whom have probably for the first time offended against the law, by embezzlement, or otherwise robbing their employers. In these cases the sentences run in extremes; the fullest penalty of the law being exacted in some, while others are fined a shilling and discharged, or having their judgments respited, are allowed to go at large, in the hope they will sin no more. Here if any rule of action could be recog-

nized, and character had its weight in court, all would be fair ; but unfortunately it is not so ; some, having the best of characters up to the moment of the commission of the offence, are sentenced to the severest punishments at the bar ; others, without any such advantage (at least in open court) escape entirely free. *In all such cases it is influence with the judges which produces the disparity.* It has often happened, when I have applied to make a prisoner's brief, that a letter would be put in my hand, on reading which I learnt some friend, or father's friend, or friend's friend in the second or third degree, had seen a certain alderman, who had made a promise to interfere. Probably I should be asked if he (the prisoner) might rely on the success of the interest ; in which case I invariably told them that they might be sure of his (the alderman) having the ability, if he could be brought to exercise it. I was never mistaken ; when the promise was made, the party always got off, and the instances within my own knowledge are not few. This influence is often used in a more unjust manner. When a confidential clerk or warehouseman is charged with embezzlement, it not unfrequently happens that the prosecutor has a motive for being anxious to secure the entire riddance of the prisoner by having him sent out of the country, he (the prisoner) being in possession of secrets which it might not be so well to have divulged. To accomplish this, hyperbolical reports of the man's extravagance are circulated, his having kept one or more mistresses, &c., that he has been doing this for a long period, by robbing his master. All this, poured into the proper city channels, never fails to reach the judge who tries him, and produces the object sought, viz. transportation for fourteen years. . . . . This can only be reformed by the appointment of judges out of city influence. . . . . If it be thought proper, in a question involving a consideration of a few pounds, that a superior law officer of the crown should preside, of how much more importance is that of life and death, of liberty and character ; a question comprehending the interests of so many, the fixing a stamp of infamy on the father of a family, and in which a wife, children, and relations are all concerned ! It is true that during the first days of each session, one or more of the fifteen judges attend to try the capital cases ; but they do not always go through the whole of these, leaving some for the Recorder. It is remarkable how the auditors and prisoners are penetrated with the manner and patience of these judges, as contradistinguished from the hurried way in which the trials are usually conducted in these courts. The effect it has on the prisoners is astonishing, notwithstanding the awful sentences which invariably follow in these cases, viz. death. They are generally satisfied they have had a fair trial ;

and it is a remarkable fact, that none who are tried by the city judges ever think justice has been done them. However guilty they may be, they expect a chance on their trial, and decent treatment while they are undergoing it. The most brutal are sensible of the difference so apparent when they appear before what they call "a real judge." I have seen them come from the court positively pleased, although found guilty, saying, 'I am guilty fair enough: the judge would have let me say anything, he is such a nice old man.' I have observed the demeanour of these men subsequently to be always better than those who could never get rid of the notion that they had not had a fair chance on their trials. . . . The rapid and indecent manner in which the trials are usually conducted at the Old Bailey Session-house is a constant theme of censure by those who have ever entered that court. For several sessions I made a calculation of the average time which each trial occupied; I never found it exceed eight and a half minutes, notwithstanding many cases engage the court occasionally a whole day; and in the Old Court, where the most of the capitals are tried, they usually, on the first, second, and third days of the sessions, severally take many hours. The average of eight and a half minutes is made on both the courts, and takes in all the prisoners tried for eight successive sessions. The rapidity with which the trials are dispatched throws the prisoners into the utmost confusion. Fifty or sixty of them are kept in readiness in the dock under the court, to be brought up as they may be called for. These men seeing their fellow-prisoners return tried and found guilty in a minute or two after being taken up, become so alarmed and nervous, in consequence of losing all prospect of having a patient trial, that in their efforts at the moment to rearrange their ideas, and plan of defence, and put the strongest features of their cases before the court as speedily as possible, they lose all command over themselves, and are then, to use their own language, taken up to be knocked down like bullocks, unheard. Full two-thirds of the prisoners, on their return from their trials, cannot tell of any thing which has passed in the court, not even, very frequently, whether they have been tried; and it is not, indeed, uncommon for a man to come back, after receiving his sentence on the day appointed for that purpose, saying, 'It can't be me they mean; I have not been tried yet;' conceiving from the celerity with which the business was performed, that he had only been up to plead, or see a fresh jury empannelled, for which purpose he had been probably several times called up in the course of one or two days, waiting in the dock. With countrymen, whose habits are slow, there is sometimes no possibility of persuading them

to the contrary. . . . It was a boast at the Old Bailey that a recent city judge could despatch sixty or seventy trials a day ; and a lament was made that his successor did not so successfully drive on the business. With the knowledge of these facts, can we wonder that many serious mistakes should occur ? The evident anxiety of all the city judges to proceed with indecent and unjudicial haste with the business of this court, makes them frequently petulant at any interruption or impediment to their usual dispatch, which manifests itself in much acrimony between themselves and counsel ; all of which tends to throw the prisoner off his guard, and prevents him asking questions which might tend to give the whole proceedings a new turn, and which he recollects after he comes out of court. Hence arises all that subsequent explanation and complaint which gentlemen connected with the prison are constrained to endure from the prisoners and their friends, after the trials are over, every sessions. The judges have an idea that the business of the court could not be got through in any reasonable time, if the trials were not expedited in the way they now are ; forgetting that any thing done in a hurry is never well done."—p. 52—61.

If this account of the proceedings of the Court of the Old Bailey at all approximate to the truth, it must be obvious that such a state of things ought not to be suffered to continue. The constitution of the court is vicious, inasmuch as the judges are too much within the influence of local and subordinate interests ; and however unconscious they may be of the effect produced on their minds, evidently do not live in that pure and untainted atmosphere which is breathed by the judges of Westminster-hall. In the next place, it is manifest that the court, as at present formed, is incapable of transacting, in a decorous manner, the business which belongs to it, or of giving a fair and satisfactory trial to all the prisoners arraigned at its bar. The constitution of this court therefore requires a radical change ; the appointment of the judges ought to be taken from the city and vested in the crown ; and the number of judges ought to be increased, so that there could either be more courts or the same courts could sit for a longer time.<sup>1</sup> The author proposes an appeal court as a remedy for the defects of the Old Bailey ; but this would be curing one evil by another ; and

<sup>1</sup> The jurisdiction of the City of London, and the manner in which it is exercised, will, we hope, come under the examination of the Corporation Commissioners.

there is assuredly no reason for creating an appellate jurisdiction, with all the delay and expense which necessarily attend it, until every attempt has been made to remove the defects of the tribunal from whose decision the appeal is to lie. We do not mean to say that a court of appeal is absolutely inadmissible in criminal matters; but if any such tribunal should be established in England, there could be no reason why the prosecutions on the circuit should be exempted from its jurisdiction; and we believe that we may say, without danger of contradiction, that no part of the administration of our law gives such general satisfaction, or less requires revision, than the trials of prisoners by the fifteen judges at the country assizes.

It appears that the judges of the Old Bailey are not only sometimes influenced by concealed and personal interests, but often pass sentence without reference to those fixed and steady principles which ought to guide their conduct in measuring out the different lots of punishment to convicts. On this point the testimony of the author is full and decisive.

“ Turn over the pages of the Old Bailey session papers for years past, and you cannot but be struck with the anomalies which are there apparent, with respect to crimes and the sentences that have followed. The impression a perusal of these papers made on my mind was, as if all the business had been done by lottery; and my observation, during twenty-two sessions on the occurring cases, has tended to convince me, that a distribution of justice from that wheel of chance, could not present a more incongruous and confused record of convictions and punishments. In no case (always excepting the capitals) can any person, however acute and experienced, form the slightest opinion of what the judgment of the court will be. Of this the London thieves are fully aware. I never could succeed in persuading one, before his trial, that he was deprived of all chance of escape. They will answer, ‘ Look what a court it is! how many worse than me *do* scramble through; and who knows but I may be lucky?’ What men know they must endure, they fear; what they think they can escape, they despise: their calculation of three-fourths escaping is very near the truth. Hope, the spring of action, induces each to say to himself, ‘ Why may I not be the lucky one?’ *The chance thus given of acquittal is the main cause of crime.* I do not mean to say three-fourths come off free; they are subjected to some kind of punishment (excepting



a few cases of judgment respited): the others feel no doubt, what they undergo, but it is only as a soldier in the fight considers a scratch—otherwise coming off with a whole skin, being ready for action again.”

The author proceeds to mention the case of a crime jointly committed by two persons, of whom the one who received a good character from his employers, was sentenced to 14 years transportation: the other, who had no witness to speak in his favour, was sentenced to six months’ imprisonment: and he then goes on to say:

“Instances of this kind occur out of number, to confirm the rogues in their preconceived notions of the uncertainty of punishment, and that ‘the greatest crimes come off the best.’ This is an aphorism among the thieves. I have seen some of them, after being sentenced by the court, dance for hours, calling out continuously, ‘Did I not tell you all, the biggest rogues get off the best?’ The scene in the several yards of Newgate on the sentence-days, after the judgments have been past, defies any description on paper. Some will be seen jumping and skipping about for hours, frenzied with joy at the very unexpectedly mild sentence passed on them; others are cursing and swearing, calling down imprecations on the Recorder, for having, as they say, so unfairly measured out justice; all agreeing there is no proportion in the punishments to the crimes. It may be said, it is of little import what these men think, so they are punished. But is it of no importance under what impression the others are discharged? if the discharged feel (as they assuredly do) that punishment is a matter of chance, they return to their habits, as the hazard-player goes again to the dice, in hopes of coming off a winner, and reimbursing himself for former losses.”—p. 48—51.

This uncertainty in the sentences of the convicts is further increased by the manner in which the prerogative of pardon, vested in the king, is exercised by the subordinate authorities. The business connected with this matter is transacted in an office belonging to the Home Department, called *Mr. Capper’s office*, which gentleman is the superintendant of the convicts, and has the regulation of their distribution in prisons and hulks, or of their transportation to a penal colony. All petitions to the King, or the Home Secretary of State, relating to convicts, are delivered to this office; and information on the same subject may be obtained there from Mr. Capper



in person. This office, as may be readily imagined, is crowded with petitions for the remission or commutation of the sentences of convicts, and it is very probable (and perhaps not much to be lamented) that the chief part of them receive a very cursory examination. The author, however, (who is very profuse of his charges of malversation) is not contented with merely accusing this office of carelessness, but states that it suffers its decisions to be guided by parliamentary influence, and frequently makes the granting of pardons a matter of patronage. We give these assertions in the writer's own words: nevertheless we cannot help hoping that they are either much exaggerated or rest upon some misapprehension.

"No man, whatever may be his case of injury, has now the slightest chance of being fairly heard, without having a friend, possessed not only of humanity and perseverance, but of powerful influence, if redress is sought through the secretary's office in the form of a petition, however palpable and clear his case may be. The difficulty is to get a re-consideration of it. In many cases I have written four and five petitions, each time referring to the former, and when at length through the perseverance, or perhaps the violence of an individual, some kind answer was obtained, it was found they had never heard of the case, and all the papers were lost. This is sometimes a serious matter to the petitioner, as the same affidavits are not always again to be obtained. I drew up one not long since of a most important nature to a prisoner, which was attached to his petition, and sent into the office. After making a second and a third application, it was discovered the document was mislaid or lost. On referring back to the party who made it, I was informed he was dead, and the prisoner left without hope of ever again being able to establish his case. . . . Apply to any of the gentlemen connected with the Old Bailey, and inquire what steps they would recommend to be adopted for the liberation of a prisoner supposed to be innocent. Have you any interest with the Secretary of State? will be the first question put to the inquirer. Secondly, any man of title, or any member of parliament, possessed of ministerial influence, that you can call in to your aid? So impressed are the gentlemen belonging to Newgate with this notion, that if the inquiring party reply in the negative, he will at once be told, there is no hope of obtaining a pardon or commutation; and if a particular individual is mentioned as likely to assist, they will sometimes add, "Don't employ him, he is not liked at headquarters." . . . The instances wherein culprits are discharged

through the pardon-office, by means of influence, regardless of merits, are of continued occurrence. The manner in which noblemen and others of aristocratical interest are induced to interfere in these cases, is not unfrequently at the solicitation of a favorite servant, a butler, valet, or lady's maid, who are rendered unhappy by a brother or cousin being under a heavy sentence of the law, and naturally enough avail themselves of their proximity to power, and entreat their masters and mistresses so importunately to interfere with their good offices, that even for their own sakes they interfere. . . Not a few have escaped through electioneering interest. When the condemned party has a father or brothers possessed of votes for a borough, the member is speedily given to understand, that a pardon for their relation would bind the whole family for ever to his interest in the borough."—p. 117, 124, 142.

The list of convicts capitally sentenced at the Old Bailey is laid before the Cabinet Council, who select from it the persons who are to be executed. In making this selection the members of the Cabinet (who certainly cannot be considered as peculiarly fitted to form a criminal court of appeal,) may be supposed to act on the suggestions of the Home Secretary.

"Let us inquire what he (the Home Secretary) knows more than any other member of the Council. His only sources of information are through the senior clerks of his office, who are in daily communication with the officers of Newgate, where all kinds of exaggerated reports, in every case, both for and against the prisoners, are always in circulation. These reports are picked up, and form memoranda to go into the Secretary's hands, for his guidance and advice to the Council. They hear no evidence, and do not even consult the judge who passes the sentences on the prisoners. As it is now conducted, the members of the Council may as well adopt the plan the condemned criminals say they do, viz. as soon as they see the list of names, determine on how many out of the number will suffice for example (and latterly how many the public will patiently see executed,) then write the whole of the names on slip of paper, and putting them into a bag, call the Recorder into the council-chamber, and desire him to dip in for the names, as many as may be wanted. It is a common remark among the city authorities, that a large majority of the malefactors selected by the Council for execution have been in opposition to those which in their judgment, derived from a knowledge of the facts of the cases, they considered most likely from their crimes to have suffered: and it is this perhaps which occasions so much exertion on the part of

these gentlemen, in every case, to save the malefactor when ordered for execution."—p. 129, 135—41.

We will sum up the author's account of the various *causes* of the uncertainty of punishment, with his remarks on the *effects* which it produces on the minds of malefactors.

"All legislators and writers who have treated on this subject (punishment,) have, I conceive, fallen into one error, which it is of the first importance to point out, viz. that offenders weigh the consequences annexed to the commission of crime, with a merchant's eye of profit and loss; that the robber sits down and figures to make up his book, like a race-horse betting man of the turf, calculating how he can stand to win the most at the least possible risk of losing: now this the professional criminals do to the nicest point of calculation, as regards the chances of detection in committing certain offences, but they reflect not on the particular consequences annexed to any specific crime. Their fears are all absorbed in the general one of detection—of the loss of liberty, and deprivation of their licentious enjoyments; the sight of an officer awakens no other sensations of fear than that of a period having arrived which must terminate their career of plunder and pleasure. Punishment never crosses their minds, not even when committed to prison; then all their thoughts are engaged on the chances they have of an acquittal, and not on the probable measure of personal punishment and pain which may be awarded them. As the day of trial approaches, they begin to discuss with their companions their probable sentences as to time: the happiest prisoners in Newgate being always those who expect to be capitally indicted, because they think, when death is the penalty of their offence, that the chances of acquittal are multiplied.... The expectants of transportation are invariably the most melancholy prisoners. 'What will become of poor Sal? it will be eighty-four months before I shall see her again.'\* Disgrace or punishment is regarded only as it deprives them of a continuance in an abandoned and licentious course of life; neither stripes, hard labour, or harder food, enters into their calculations of secondary punishment; it is all a question of time with them. 'How long will it be before I can return again to liberty and my companions?' is their daily theme."—p. 213—5.

\* We beg to observe that the prisoners who make this exclamation cannot be very good calculators of chances, for a sentence of seven years' transportation almost invariably means confinement in the hulks for three years and a half.

We have no doubt that the author is correct in his statement that the chief inducement to the commission of crime in the metropolis is the uncertainty of detection and conviction ; and such, we believe, would still be the case under the best system of police and the most perfect criminal procedure which could be contrived and established. Nevertheless, it cannot be denied that much might be done to diminish the number of favourable chances on which the London malefactor may now reasonably calculate, by improving the constitution of the tribunal by which he is tried, by introducing a greater uniformity into the sentences, and by limiting the interference of the government with the decisions of the criminal judges. It seems to us, however, that the criminal business of the metropolis can never be conducted in a satisfactory manner, until a public prosecutor shall have been appointed, who would take the case out of the hands of private parties, who would enforce the attendance of witnesses, and not permit them (as the author complains that they now do, p. 108,) to laugh at the subpoena of the court ; who would prevent the tumultuous despatch of important trials which now seems to be too common at the Old Bailey, and who could officially communicate to the Home Office information on which it could rely, instead of its being left, as is now the case, to act either on vague and unauthenticated reports, or the solicitations of interested parties. There are many parts of our law which are still suited to country districts, but which have been found to fail in large towns : thus the unpaid magistrates still continue to dispense justice in all counties, and all but the most populous towns, nor is it very easy for those who most object to their jurisdiction to suggest a substitute for them : but in London and some of the great manufacturing towns stipendiary magistrates have been long appointed, by whom all the business is transacted. In like manner, without making a general change in our system of private prosecutions, we would put all the indictments of the metropolis, and perhaps of Liverpool, Manchester, Birmingham, and such large towns, in the hands of a public prosecutor. In the country districts there is not a sufficient number of prosecutions to make it desirable that there should be a person appointed by the crown to conduct all the criminal business : in the large

towns, however, it is otherwise; and we are fully persuaded that the first step towards the improvement of the criminal procedure at the Old Bailey would be the appointment of such an officer as we have described. We agree, moreover, with the author in thinking, that in our system of secondary punishments, that which the criminals most consider is the *loss of time*: we expressed this opinion with respect to one of these punishments in a former number, when we said, "The hulks are considered in the light of a sacrifice of so much time: a prisoner gives up three years of pleasure, but he does not pass three years of pain."—(Vol. 7.) It is precisely on this ground that we objected to all our secondary punishments, as being inefficient and devoid of terror: a convict in the hulks or in New South Wales is indeed deprived of his liberty, and may find the monotony of a gaol or a slave-gang somewhat irksome after the sensual enjoyments and the feverish excitements of his previous life: but his punishment is rather a source of *privation* than of *actual suffering*; his time is rather *wasted* than passed in *misery*. We would, however, make punishments dreaded for their positive as well as negative effects: we would not only deprive a convict of his old pleasures, but inflict on him new pains: and it would then be seen whether the minds of criminals would not be influenced by the fear of punishment, as well as by the dislike of loss of time. Mr. Wakefield says, that when he read the account of the American penitentiaries to the prisoners in Newgate, they shuddered with horror; we should be glad to know where is the man who shuddered at the prospect of being an agricultural labourer, or a mechanic, or a shopman's clerk for eight years in New South Wales? It is quite absurd to suppose that such refined calculators of chances, as the London thieves are represented to be, will not fear that which is truly formidable, because they do not fear that which is not formidable, and because they dislike a punishment on the only ground which makes it an object of dislike, viz. that it cuts them short in their career of pleasure and profit. It is mentioned in the last report of the American Prison Discipline Society, that during the last few years crimes have increased in those states of the Union which have not adopted the improved penitentiary system, not because the police has been worse, or be-

cause the temptations to crime have been greater, but because the thieves migrated into states where the punishments were less severe, from the states where the punishments were more severe. This is a decided proof that persons about to commit a crime sometimes take into their account the quantum of punishment, as well as the chance of conviction. If under our penal system persons about to commit crime do not anticipate pain, the reason is not that they do not fear pain, but that our system does not inflict any.

The author, notwithstanding his dislike for nearly the whole of our criminal jurisprudence, nevertheless greatly admires the most mischievous and absurd part of it, viz. transportation to the colonies. He is very angry with the committee on secondary punishments, with Archbishop Whately, with Mr. Wakefield, with Mr. Capper, with Mr. Wontner (and he might have added, with nearly every person who has recently spoken or written on this subject,) for saying that transportation is not dreaded in this country; and he meets them with the following bold assertions:

"The only punishment they (the thieves) dread is transportation; they hold all others in contempt; and *I believe even that of death would lose its terrors did it not lead to the greatest of all their dreads, transportation for life.* Death, indeed, has no terrors for any one until met with at close quarters. Tell the thief of death and he will answer, '*Never mind, I can die but once.*' Name transportation, and they turn pale.... He (Mr. Wakefield) thinks transportation has no terrors; I think no punishment so much dreaded. It is the manner in which this instrument of the law is used; it is the uncertainty of it which robs it of its sting, and makes it powerless as an example. When it is one day passed on an offender for stealing a penny tart, or a small loaf of bread, and the next a hundred old and practised pickpockets [are] allowed to get off with one or two months' imprisonment, it is not to be expected they will hold this or any other punishment in dread until they are overtaken by it... They calculate that but one in four of the number found guilty is transported, making a balance in their favour of three to one, over and above the chances they reckon their skill gives them of committing crime without detection. As they cannot in any other way account for the number of old offenders being permitted to escape with *finer* (i. e. imprisonment,) a notion is common with them that the recorder is afraid to transport more than a certain number, lest



he should encumber the government, and increase the charges for their maintenance at home, or conveyance abroad, beyond what it would be prudent to incur."... "Observing only a certain, and nearly an equal number transported each session, they have imbibed a notion that the recorder cannot exceed it, and that he selects those to whom he takes a dislike at the bar, not for the magnitude of their offences, but from caprice or chance. It is under this impression they are afraid of speaking when in court, lest they should give offence, and excite petulance in the judge, which would, in their opinion, inevitably include them in the devoted batch of transports, of which their horror is inconceivable; first, because many have already undergone the punishment; and secondly, all who have not are fully aware of *the privations to which it subjects them*."... "I have seen some thousands under this sentence, and never conversed with one who did not appear to consider the punishment, if it exceeded seven years, equal to death. The first question an untried prisoner asks of those to whom he is about to entrust his defence is, 'Do you think I shall be transported? save me from that, and I don't mind any thing else.'"—p. 42—8.<sup>1</sup>

With regard to these statements, we remark, in the first place, that it is a palpable exaggeration when criminals are represented as dreading transportation as much as death. They may, perhaps, sometimes use this *expression*; but we have no doubt that they would strongly object to be taken at their word, and with the large majority of convicts under sentence of death, we suspect that a respite is so grateful, that they scarcely consider what is the punishment to be substituted for it. Setting aside, therefore, this assertion, which is manifestly overcharged and absurd, we believe that the author is strictly correct in saying that the London criminals dread transportation more than any other secondary punishment, excepting, however, the penitentiary; that is to say, they dread exile to a distant land, either for life or a long term of years, more than imprisonment in society, and without silence, in their own country. Having been for the most part accustomed to a life of ease, luxury, and debauchery, they naturally view with alarm (as the author justly remarks) the *privations* of a convict's life in New South Wales or Van

<sup>1</sup> The author has another passage on the dread of the London delinquents for transportation, (p. 235,) but it refers not to the *punishment*, but to the *sentence*, i. e. when it is commuted into imprisonment in the hulks.



Dieman's Land. But this does not prove that transportation is a severe and painful punishment: it merely proves that loss of liberty and exile for six or eight years is worse than social imprisonment at home for two or three years, at least in the opinion of the flourishing London thieves. Criminals in the country, and especially in Ireland, may perhaps entertain a different opinion on this subject. Hence we find that crime is not unfrequently committed *in order that the convict may be transported*, which, under a good penitentiary system, would be utterly impossible. We mentioned in a former number the cases of thirty Irish women, who had committed crime apparently in order to join their husbands and other relations in the penal colonies: a letter from a transport, circulated in Bedfordshire, made the agricultural labourers desire to be transported (Law Mag. vol. vii. p. 16, 17); and the author mentions an instance of an attorney's clerk having been transported for embezzlement: and that about two years after he left the country, "his eldest son, a youth aged fifteen years, committed an offence for the avowed purpose of being sent out to his father: this fact was stated to the court, and he was accommodated with seven years transportation, with permission to go out immediately to his parent."—(p. 145.) It is quite clear that to such persons as these, the distinction between transportation and emigration consists merely in the *name*: if a transport's life was positively *painful*, no one would covet it, whatever might be his circumstances: we should be glad to know who ever committed a crime in order to gain admittance into one of the new American penitentiaries? The author, however, allows in another place that, although convicted criminals may dread transportation, criminals at large entertain a different view of this punishment; and as the object of a punishment is not to terrify the sufferers, but to deter others from crime by the fear of pain, he in fact by this admission neutralizes the effects of his other remarks. Speaking of the proneness of the vulgar to exaggeration, he says,

"Unfortunately this propensity of their's is now acting in favour of crime; they now persuade themselves that at the worst *the life of a convict in the colonies is no such bad life, and believe that in many instances fortunes have been and can again be made.* Most of them,

however, whilst at large, do but flatter and pander to their own deception, for when the sentence is passed on them, they become dreadfully alarmed; yet, as their conversation in the world among their companions has an opposite tendency, *many thieves are ready enough to listen to the flattering tale.*"—p. 217.

The author is very severe on Archbishop Whately's work on Secondary Punishments, and he attempts to refute several of the positions advanced in it: but his remarks on it are so utterly absurd, and his misrepresentations of the arguments which it contains so palpable, that it would be a mere waste of time to expose such worthless and incoherent declamation. Among other mistakes which he commits on this subject, he attributes the article on Secondary Punishments which appeared in our thirteenth number, and which is reprinted in Archbishop Whately's Appendix (p. 104—167,) to Archbishop Whately himself; whereas the archbishop in his Letter to Lord Grey distinctly states that he is not the author of it.—(p. 2.) The following may serve as a specimen of the manner in which his criticisms of this work are written:

"His notions are randomly written down, unfounded on any data; and when any facts are cited, they are always distorted or misapplied. Thus, because Dr. O'Halloran was, after a long service, allowed to keep a school in New South Wales, for the support of a large family, the archbishop (i. e. the Law Magazine,) takes occasion roundly to assert, p. 117, that all gentlemen convicts are allowed to live in a 'state of comfort and enjoyment; that is to say, they are employed as clerks in the government offices, or given as tutors to private families; their whole time, except when occupied with business, being at their own disposal.'"—p. 251.

Now, if any one thing relating to the punishment of transportation is more certain than another, it is that the class of gentlemen convicts have not been compelled either to agricultural or mechanical labour; but have been employed in callings more agreeable to their former mode of life, as clerks, tutors, schoolmasters, tavern waiters, &c. The evidence of all the different witnesses examined by the Committee who state this fact will be found either extracted or referred to in the part cited by the writer himself from Archbishop Whately's

Appendix, p. 117—20. So far from our having rested our statement on the single case of Dr. O'Halloran, we did not even *mention his name* in the text, and only named him in a note, where we expressed our regret that he should have been permitted to have the management of a school; and although this remark excites the writer's displeasure, we still think (without at all entering into the merits of Dr. O'Halloran's case, of which we know nothing,) that even in such a sink of vice and profligacy as New South Wales, it is a shameful thing that the education of the rising generation should be entrusted to convicts. The practice of employing gentlemen convicts in superior stations of this kind is indeed so common that the author mentions two cases incidentally within a few pages: one of an attorney, who was transported for embezzlement, and is now in an attorney's office at Hobart Town—(p. 103): and another of a shopman, who was transported for burglary, and is now a teacher in a school at the same place.—(p. 130.) It is utterly inconceivable that any body who had read (and understood) the evidence taken by the late Committee on Secondary Punishments, or even the extracts which we made from it, should have fallen into the error which this confident writer commits, in pretending to correct the statements of others.

Before we quit this subject, we will cite the following passage, as the letter to which it refers was mentioned by Mr. Wontner in his evidence before the Committee on Secondary Punishments, and was quoted by us as the only testimony of a convict to the sufferings of transportation.

“ About three years since, Mr. Wontner, the governor of Newgate, received a letter from a young man, a transport in New South Wales, which was inserted in most of the daily newspapers by order of the sheriffs. The letter commenced by thanking Mr. Wontner for the kindness shown him while in Newgate, and then went on giving him a most melancholy picture of his then wretched state of existence. He said he was some hundreds of miles up the country, beyond Paramatta; that he was employed in tending sheep, slept in a mud hut on straw, and living on the most coarse food, and above all was forty miles from any place of religious instruction, which grieved him more than all his other troubles. Since the receipt and publication of this letter, I have seen a near relation of

the writer of it, who informed me that the convict was never so situated as described in the letter; and that he (the relation) had about the same time himself received a letter, explaining the motives which induced him to write the one addressed to the governor of Newgate, viz. that on his arrival in the colony, the great interest which had been previously exerted for him by his friends, procured him some signal favours, which excited the jealousy of another young man, a fellow-convict, who went out with him, and who threatened to write home and inform the authorities of the shameful partiality shown. This alarmed the favoured man, who then wrote the letter in question, in the hope of counteracting any effect his rival's communication might produce on the minds of those to whom it should be addressed."—p. 247.

As we intend shortly to devote a separate article to the subject of capital punishments, we shall not examine what the author says on this point. There is of course, the usual allowance of declamation on the severity, or what he is pleased to call the *acerbity*, of our criminal code: although every one acquainted with the mode in which these laws are executed, knows that it is only their letter which is sanguinary, and that there are few crimes, and none but those of a serious character, which are now visited with capital punishment.

The author of this book appears to be a very ignorant man; and in order to display the extremely small portion of learning which he possesses, he fills his ungrammatical and incoherent sentences with hard words, unknown to the English dictionary, and intended to be derived from the Greek and Latin, but mangled, mis-spelt, and misapplied in the most ludicrous manner. We do not indeed, remember to have met with any writer whose style so closely resembles that of Mrs. Malaprop, as the author of *Old Bailey Experience*; like her too, he evidently prides himself most especially on "his use of the oracular tongue, and a nice derangement of epitaphs." In addition to this unfortunate propensity for fine words, he appears to have picked up, from some apothecary's shop-boy, just such a smattering of medical science, as enables him to pervert a certain number of medical terms, and to mis-state a certain number of medical facts, for the purpose of illustrating criminal jurisprudence. The following are a few flowers selected from this garden of slip-slop eloquence.

“ There can be no happiness in a country, when all the parts of the community are not harmonized ; and it is the peculiar province of the leaders in a concert to make themselves acquainted with the keys and chords, to produce harmony. The body politic may be compared to the body corporate ; if the *symbolism* of the parts are disturbed or interrupted, disease is the immediate result, morbid action commences. If there be a non-consent of the different parts of the body, *through the intermediation* of the nerves, muscular volition ceases, and all is jarring and confusion, when the body becomes *elumbated* and unhealthy.”—p. 2.

“ The material essence of religion is deep seated within the pericardium, mingled, and in company with all the other feelings of the heart, which when ripe and matured make a journey to the head, to hold communion with the judgment, one sense instructing the other.”—p. 18.

“ Hunger, it is true, does most commonly stir all animals into action, but partial feeding for any length of time, combined with an agonised state of mind, arising from surrounding miserable circumstances, will inevitably *superinduce inappetency*, reducing the human frame into a kind of semi-torpid and *vivid* state, under which the mind becomes *stultified* and callous to the affections and *amenities* of life.”—p. 23.

“ In the neighbourhoods where most of the offenders have been brought up, vice is found in a *concrete* and concentrated form, contaminating like a universal *miasmata* all who breathe the pestilential vapours. The influences on our moral natures are slow but sure, *like a vortex or whirlpool*. Vicious examples draw but slowly at the outer circle, increasing at every completion of each concentric ring, until at length they are drawn rapidly down, never to rise again.”—p. 368.

“ Sensitive *minds*, by the practice of this vice (gambling), either become maniacs or *suicides* ; those possessing more *hebetude*, undergo in every state the *process of callidity* and *callosification*, until they become hardened and *tempered* for every act of desperation against the laws of their country, and the *social* bonds of *society*.”—p. 383.

We hope that our readers will not be so flinty-hearted as to resist the following appeal to their good feelings.

“ *Dispossess yourselves of a philanthropy*, and set to work seriously to reconstruct society on a principle of universal good to all God's creatures : cease to talk, but perform.”—p. 24.

The following important fact has not hitherto been sufficiently attended to : now that it has been stated by the

author, we have no doubt that its truth will be universally recognized.

“It is *well established* that every pound-weight of refuse or manure, either animal or vegetable, will, *under manipulatory cultivation*, return four pounds; the poor man *therefore*, if allowed to locate himself on any land, however bad, would gradually bring it into profitable cultivation.”—p. 25.

We particularly recommend the following passage as written in the author's best manner.

“I wish that in the fanciful theories of nature, so frequently *promulged*, that some reasoner would take up the doctrine of metempsychosis, and persuade our rich men, that after they had enjoyed the good things of this life, their souls would transmigrate, for a second course of probation, *into the bodies of embryo mortality secundinely enveloped* among the poorer classes of society; and that on the extinction of their lives in this latter state, they would be summoned to appear before their God, to answer for the deeds done in both stations of terrestrial existence; and that (qu. what?) on an impartial review of their conduct in each probationary state, would determine whether *their eternal residence should be taken up in Tartarus or Elysium*. The man who shall *firmly establish* this doctrine on earth, will do all that is required for the poor, and *will well merit deification*; if this be levelism, it savours much of divine equality, and the apotheosis of such a man would, *we may reasonably presume*, be pardoned by the Deity. *No blessing comparable to this could be conferred on the world*; it would show the proud man that rank and possessions were indeed usufructuary, that all pains and pleasure at last were brought to one standard; it would remove the rich man's *myopy of soul*, and incline him to advocate *a system of coenobiumism*. Now the landholders withhold their advocacy for the settlement of the poor on land, under an apprehension of further multiplying the pauper population. Shallow reasoners! *What hiatus put this into their heads?* The fatuity of such arguments *are easily answered*; men in a state of idleness ever propagate their species faster than those who are employed, &c.”—p. 29, 30.

It appears to us that the author's talents cannot be more profitably employed than in convincing the world of this doctrine. He must not be disheartened if his success should not at first correspond to his merits. We would advise him, however, in lecturing the rich, not to meddle with political questions, as when he says that “the waste land of this country, by the law of God, belongs to the poor,” that “the waste commons

are the inheritance of the poor," and the system of inclosure will ultimately leave the poor to starve." (p. 24, 25.) The author, if his professional knowledge extends beyond the Criminal Statutes and the Newgate Calendar, ought to be aware that land held in common is as much appropriated as land held in severalty; that a poor man, if he is not a commoner, has no more right to turn his cow or his sheep on a common than into an inclosed field: and that an inclosure act does not deprive any person, either rich or poor, of his rights, but merely makes a new distribution of the inclosed land. He ought, moreover, to know, even if he has never been out of the sound of Bow-bell, that *waste* land (as the Poor-law Commissioners remark,) is very far from being *wasted*,<sup>1</sup> but that it is for the most part more productive as used for pasture, than if it were broken up for tillage.

The following are other ornaments of the author's style. He tells us, p. 13, that "education will soften down the asperities of mankind, and teach them that *mutability* of feeling and reciprocity of interests are the only bonds of society," by *mutability* meaning *mutuality*, if there was such a word. In p. 15, he calls a workhouse "a cruel and *pavid* situation." In p. 20, he disapproves of "terror and *impetration* on the part of the teacher." In p. 35, the gentry are directed to "cease *sermonization* till they have *harmonized* the minds of those whom they have injured." In p. 107, it is stated that "the modes of getting money in the metropolis are *multivious*:" and in p. 118, that "a man needs not *multocular* powers to penetrate into this *sanctum sanctorum*" (the Home office), to discover that the chief secretary reads very few petitions. Speaking of the same labour, he says, "no man could undergo it; he must give it up *maugre* all consequences, however gifted with *longanimity*" (p. 120); and he justly adds, that "when the *omnigenous* matter is considered, it would be an *operose* work for one person to read them all" (p. 121). In p. 129, mention is made of a burglar, "named Allen, *cognomenized* Jack the Painter." In p. 130 we are told, that when the persons connected with Newgate heard of a certain person being selected for execution, "they all, *unâ voce*, *declāra-*

<sup>1</sup> See extracts from Information received by the Poor-law Commissioners, p. 424.



tively or optatively, condemned the conduct of the council." In p. 184, it is said that 'our laws are justly designated sanguinary; taken as a whole, no legislators, but those in a state of *cynanthropy*, could contemplate them without perturbation and horror of mind.' In p. 236, we hear of persons "so girdled round by circumstances, that they cannot extricate themselves" from crime; and are told that "severity will not *awhake* the regular offender." Speaking of severity, he says, p. 229, "the obtuseness of some men on this head is surprising, thinking no crime, however trifling, *ignocible*." The word *homogenity* (meaning, we suppose, *homogeneousness*) is a great favorite with the author: in p. 230 we are informed that cruelty "changes a man's *homogenity*, blunts his mind, and renders all within dark as Erebus:" in p. 237 he says of convicts, that, "however this question be viewed, their *homogenity* is such, that expatriation is the only remedy:" in p. 389 it is asserted, that "the homogenity of the virtuous and vicious classes is distinct:" an assertion which we should understand more easily if we knew what the virtuous and vicious classes are. In p. 240 and 282 we hear of "prisoners being *disassociated* from habitual offenders." In p. 246, the author boasts that his opinions are not formed on "vague reports, the putting forth of which may arise from causes *ramified into ten thousand of falsehoods*, and sometimes from facts which have been distorted by the *stultiloquence* of those through whose *hands* they pass." In the same page, mention is made of "the *subdulous* character of convicts." In p. 287, something called "criminal *ingrain*" is mentioned. In p. 311, an interesting definition is given of a person called a *phycologist*: "By the *symbolism of the nerves* we are informed that a *consent* of all the different parts of the body *are* kept up; but how the sensations of pleasure can be imparted when the mind is labouring under a feeling of horror at beholding the violent death of a fellow creature, must be left for the solution of the *phycologist*: he who has a knowledge of all science, human and divine." P. 313 contains several words which we do not understand, such as "women *casmisating* themselves," and "uncoruncated gynecocrasy." In p. 327, we hear of a "catenated body," which is also called "a sympathetic chain." In p. 356 it is said of the London thieves, that "the generality of them, when young, are highly sensitive; and among

themselves, *they entertain all the amenities* of which our natures are susceptible." In p. 387 the author, speaking of brothels, says that "our mock-modest writers have almost persuaded themselves of the *nullibility* of these houses:" and in p. 387 he justly adds, with much novelty of expression, if not of thought, that "it is the fountain of vice whence the evil flows which requires *absterging*." Sometimes he thinks proper to use certain logical terms, of the meaning of which he appears not to have the faintest conception: thus he says, meaning to be very severe, that "Archbishop Whately's work on secondary punishments is an *omnium gatherum* of contrarieties, of propositions, arguments, and corollaries, forming a fine specimen, in the entire, of a perfect sorites" (p. 237): in p. 238 he convicts the same writer of "drawing major inferences from minor propositions." In p. 271 he suggests that some one will object that a proposition which he lays down is "an *apagogical* one." We will undertake to say that he is quite safe from this objection. In p. 278 he "ventures to *predicate*" something, meaning, we suppose, to *predict*. Throughout his book he perpetually introduces scraps of Latin, French, Italian, &c. with none of which languages he appears to have the most elementary acquaintance. Thus in p. 31, we have "*si licet parva componere magis*:" p. 255, "*legislandi cacoethes*"; p. 262, "*vis inertia*"; p. 368, "*a miasmata*"; p. 275, "solitary confinement, in which *lies* the *gravamina* of their newly-invented system"; p. 352, "the old women in the street are *criminis particeps*"; p. 23, "the well fed man reflects but little on the state of the poor man's body and mind in a *jejeûn* condition". P. 209, "the *mauvaise honte* of some *lead* them practically *in peto*, to tolerate that which the delicacy of the tympanum will not endure to be named". P. 247, "*coup fourcé*": p. 294, "*coute qu'il coute*". In p. 213, Horace is quoted as follows:

*Ætas parentum, pejor avis, tulit*

*Nos nequiores, mox duros*

*Progeniem vitiosiorum.*

In *morality*, our descendants, as these verses state, may perhaps degenerate from us: but we have some difficulty in understanding what opportunity for degeneracy will be left to the *writers* of succeeding ages: for it appears to us that the author of this work has, even in our time, reached the utmost possible limit of badness in the art of composition. L.

## ART. II.—LIFE OF LORD HARCOURT.

Few names have adorned the English peerage, which could boast their descent from a nobler source or from more remote antiquity than that of Harcourt. Connected in its course by blood or alliance with several of the most distinguished families of Britain, it claimed kindred also for centuries with one of the noblest houses that graced the proud aristocracy of France during the middle ages. When Rollo the Norman, at the close of the ninth century, overran and wasted the province of which, by a formal cession from Charles the Simple, he became the tributary sovereign, and which thenceforth received the name of Normandy, his second in command, Bernard, a Danish chief of the blood royal of Saxony, was rewarded for his services in the expedition by a grant of several valuable fiefs, among which was that of Harcourt, within a few miles of the town of Falaise. He continued next the throne in trust and power during the reigns of Rollo and his son, and was nominated guardian of the infant successor of the latter, and regent of the duchy during his minority. Of his two grandsons, Touroude or Turulph, and Turchetil, who were also joint governors and guardians of their infant sovereign, the elder had a numerous issue, and according to some genealogists was the progenitor of all the Scottish Hamiltons; the younger was also the father of a son, Anehitel, who, on the general introduction of surnames among the Norman nobles, first assumed that of Harcourt. His two eldest sons attended William the Norman in his descent on England; and from the second of them, Robert de Harcourt, descended in a direct line, without a single interruption to the male succession, the noble subject of this memoir: he was the lineal ancestor also of the Counts and Dukes of Harcourt in the peerage of France. The third in descent from this Robert became possessed, in the reign of Richard I., in right of his wife Isabel de Camvile, of the manor and house of Stanton in Oxfordshire, which was thenceforward distinguished by the name of Stanton Harcourt, and has to the present time—a period of above six hundred years—remained the property of his descendants. It is beside our purpose to trace the succession or fortunes of the family,

which continued of knightly rank down to the period of the Great Rebellion. Sir Simon Harcourt, its representative in that unhappy time, a brave soldier and determined royalist, was appointed military governor of Dublin on the breaking out of the Irish rebellion in 1641, and is honourably remembered for the gallantry he displayed in raising the blockade of that city in the following year. Being killed by a musket-shot in an attempt to dislodge a rebel garrison from the castle of Carrick Main, about four miles from the capital, in March 1643, his possessions devolved upon his eldest son, Philip, who was knighted at Whitehall immediately on the Restoration, and sat for Oxfordshire in the turbulent and short-lived parliament which met at Oxford in March 1681. By his first wife, the daughter and heiress of Sir William Waller, the parliamentarian general, (whose mother was Sir Philip's paternal aunt,) he had an only son, Simon, whose biography is here to be recorded in his capacity of a lawyer, but who is at least as well known to posterity as a politician, and as the convivial associate of the wits and poets of his time.

Of the course and circumstances of his early life, previously to his appearance in the scenes of political contest, the information afforded us is of the most scanty character, extending, in truth, little beyond the knowledge of a few dates. He was born at Stanton Harcourt in the year 1660: where or under whose guidance the studies of his boyhood were prosecuted, we have found nowhere recorded; they were completed at Pembroke College, Oxford, where he entered as a gentleman commoner in his sixteenth year. It appears, however, that, from whatever cause, he quitted the University without a degree.<sup>1</sup> Had he lived a few years earlier, and exercised his pen in any of the multifarious polemical controversies which were so hotly disputed during the greater part of Charles the Second's reign, we should doubtless have been able to resort to honest Anthony Wood for a copious exposition of his sayings and doings both as an Oxonian and a Templar, which now, for the want of some such worthy chronicler, we are constrained to leave in the oblivion which shrouds the

<sup>1</sup> In the entry of his creation as LL.D., in 1702 (the only occasion where his name is found in the list of graduates,) he is merely described as "sometime of Pembroke College."

personal history of so many of his more illustrious contemporaries. We may surmise, however, that it was during his residence at Oxford, the very head-quarters of monarchical and anti-schismatical zeal in those days, that he imbibed the strong disposition towards Toryism and High-Church ascendancy doctrines, which he afterwards professed so staunchly, and which certainly he could not have derived from the example or instructions of his father; who, educated under the guardianship of Sir William Waller, maintained a strict adherence to presbyterianism, and was distinguished as a liberal protector and benefactor of the ejected non-conformist clergy: nor is it improbable that Sir Philip's apprehensions lest this disposition should be confirmed by a longer residence in the University, were the occasion of his early removal. He had already (17th May 1676) been admitted on the books of the Inner Temple; and having duly completed the requisite probationary period of seven years' studentship,—spent as much perhaps, if we may judge from the intimacies of his after life, among the symposia of Will's coffee-house<sup>1</sup> or the Half-Moon, as in the grave and solitary digestion of the Year Books and Lord Coke,—was called to the bar on the 25th November 1683; the same year which the execrable Jefferies, just raised to the chief seat in the King's Bench, blackened with the legal murder of Sidney, the first in the horrible catalogue of his judicial butcheries. At that period also Lord Keeper Guilford,—with whom, by the half-idolatrous admiration of that matchless gossip his brother Roger, posterity has become much more familiar than his own legal attainments or judicial merits, considerable as they were, could possibly have effected for him,—was in the first year of his presidency in the court of Chancery, where he honoured his seat by a more earnest and honest endeavour to reform the abuses of his court than has been exhibited since his time by much greater men, with far better opportunities. In neither court, however, in this the very worst period of our judicial history, was the young barrister likely to hear much calculated to moderate his zeal for prerogative, or his aversion to schismatics; nor yet at the

<sup>1</sup> At the corner of Little Russell Street and Bow Street, the favourite resort of Dryden:—the Half-Moon Tavern, in Aldersgate Street, was also frequented by Davenant, Wicherley, Congreve, and the other wits of the time.

bar, which, "following its encouragings," as Roger North phrases it, had become as strongly sensible to the claims of prerogative, as in the preceding generation it had been alive to the superior excellencies of republican and presbyterian institutions. Nothing certain, however, is recorded of Mr. Harcourt until, in the year 1690, on the assembling of the second parliament of William and Mary, he was returned on the Tory interest for Abingdon, of which borough he had been already elected recorder, and for which he continued to sit during all the following parliaments of that reign, and the first of Queen Anne's. His father's death, in 1688, had left him entirely free to pursue his own political inclinations without restraint; and it is at all events some merit that he had not changed his opinions, or at least abandoned the profession of them, with the change of times. But youth is little apt to do so; that is a consummation reserved, as it was in his case, for a period of life when the selfish and calculating *experience* of the hackneyed politician has opened his eyes to the *indiscretion* (such is the phrase) of youthful enthusiasm.—He appeared as a speaker within a few days after the meeting of parliament, and took a part in almost all the momentous discussions which occupied that session. The first great debate arose upon that part of the bill for recognizing the king and queen, which went to declare the acts of the Convention parliament good and valid *ab initio*; and which he, in common with the rest of the Tory members, resisted as being in contravention of the Bill of Rights. The startling rejoinder of Somers, that if the Convention were not to all intents and purposes a legal parliament, the members of the present House, who had taken the oaths enacted by the Convention, and imposed taxes under the authority of its provisions, were guilty of treason, and bound to return to their allegiance to King James, silenced at once the threatened opposition, and the bill, which had been hardly dragged through the other House by the smallest majorities, passed the Commons in two days. The Tories, however, rallied their force in opposition to the Abjuration Bill and the suspension of the Habeas Corpus act, on both of which occasions Harcourt is reported to us as a speaker: but from the scanty fragments preserved of the debates, consisting only of short

notes taken by one of the members (Mr. Anchitel Grey), it is impossible to guess at what length or with what effect he spoke; probably he took some considerable part in debate, or he would not have been recorded at all. It would appear, however, either that his oratorical ambition cooled considerably after its first essay, or that he has been visited with unaccountable neglect; for his name occurs not once during the three following sessions. He was one of the small minority of commoners who declined to sign voluntarily the association for the king's defence entered into by both Houses on the discovery of the assassination plot in 1696. The bill of attainder against Sir John Fenwick, in the same year, furnished the Tories with an opportunity of standing forth as the champions of liberty and justice, while it drove the Whigs into the arbitrary argument, so ill according with all their recent professions, of a state necessity superseding the ordinary and constitutional forms of law. Among the ablest impugners of this doctrine,—the application of which was undoubtedly not demanded by the exigency of the particular case,—was Harcourt, of whose “brave reply” to the Solicitor-General Hawles (on the committal of the bill) a portion has been preserved by Ralph, and deserves quotation for its concise and simple force:—

“I know no trial for treason but what is confirmed by Magna Charta, *per judicium parium*, by a jury, which is every Englishman's birthright, and is always esteemed one of our darling privileges; or *per legem terræ*, which includes impeachments in parliament. But if it be a trial, it is a pretty strange one, where the person that stands upon his trial has a chance to be hanged, but none to be saved. I cannot tell under what character to consider ourselves, whether we are judges or jurymen; I never heard of a judge, I am sure I never heard of a jurymen, but he was always on his oath: I never yet heard of a judge but had power to examine witnesses upon oath, to come to a clear sight and knowledge of the fact: I never heard of a judge, but if a prisoner came before him, the prisoner was told he stood upon his deliverance, and he had not only a power to condemn the guilty but to save the innocent. Have we that power? . . . . . You cannot dispose of him otherwise than to send him back to Newgate, though you were satisfied of his innocence; but in such a case the party must undergo a double trial, which is contrary to all the rules I ever heard of. If I am a judge in the case, I beg leave



to tell you, for my own justification only, what definition I have met with of a judge's discretion: my Lord Chief Justice Coke says it is "discernere per legem;" and by that discretion I take leave to consider this case. If judges make the law their rule, they can never err; but if the uncertain, arbitrary dictates of their own fancy, which my Lord Coke calls the crooked cord of discretion, be the rules they go by, endless errors must be the effect of such judgments."

He proceeded to show the insufficiency of the evidence of the single witness to the treason in the particular case; and on the third reading of the bill again opposed to it in vain the powers of eloquence and reason, always most thrown away upon a government pursuing measures of unnecessary or unjust severity. His reputation as a parliamentary speaker was now high, and the odium which about this time began to attach itself to the Whigs contributed to his importance as an efficient and zealous instrument of the party in opposition. In the session of 1700, when the Tories had gained the ascendant in the Commons, he was selected to impeach Lord Somers at the bar of the House of Peers, carried up the articles of impeachment, conducted the several conferences between the two Houses which arose out of their differences as to the form and conduct of the trials, and was chairman of the committee appointed to direct the proceedings. We have adverted, in the *Life of Lord Cowper*, to the circumstances under which, owing to the indiscreet zeal of Somers's friends, the impeachment was carried in the House of Commons. According to the account of the debate given by Sir Robert Walpole (for the names of the speakers are not recorded in the *Parliamentary History*), it was Harcourt who, "with extremely fallacious, but as plausible remarks as the subject could admit, to which Cowper's indignation moved him to reply," opened the protracted discussion, the purpose and effect of which was to give time for the impression produced by Somers's defence to wear away. This was among the last proceedings of the session.<sup>1</sup> The new parliament, which met

<sup>1</sup> In this year he had a narrow and curious escape from loss to the gentlemen who practised in those days on Hounslow Heath. We read the following in the *London Post* of June 1st, 1700:—"Two days ago, a lawyer of the Temple coming to town in his coach, [a manuscript note in the margin states it to have been Mr.

in January 1701-2, had scarcely made any progress in business, when the king's death struck down the reviving strength of the Whigs, and threw power and profit into the hands of the exulting Tories. Harcourt, among the rest, not unreasonably looked for a requital of his services to his party in some of the good things at their disposal; nor was it long before he was gratified by the removal of Sir John Hawles from the Solicitor-Generalship to make way for his advancement. He was sworn into office 1st June 1702, and was knighted the same day in company with Northey, the Attorney-General, who, pliant enough to serve either party, had escaped dismissal. In August following he formed one in the train of courtiers who attended the queen and her husband on their visit to Oxford, and having re-entered himself of Christ Church, was among those who were honoured on the occasion with the degree of LL.D. His son, then an undergraduate of the same college, a young man of considerable accomplishment and promise, was selected for the honour of complimenting the illustrious visitors in a copy of verses, which are preserved among the Lansdowne MSS. in the British Museum, and exhibit a fair sample of easy and agreeable versification.

The tide had turned against the Whigs throughout the country as well as at court, and the elections to the new parliament produced a triumphant majority of supporters to the Tory ministry. The controverted returns, also, were determined with the most bare-faced corruption and injustice in favour of their adherents. One of these cases, the most flagrant perhaps of all, in which Mr. Howe, one of the most factious and virulent partisans of the Tories during the last

Simon Harcourt,] was robbed by two highwaymen on Hounslow Heath of £50, his watch, and whatever they could find valuable about him; which being perceived by a countryman on horseback, he dogged them at a distance; and they taking notice thereof, turned and rid up towards him; upon which he, counterfeiting the drunkard, rid forward making antic gestures, and being come up with them spoke as if he clipped the king's English with having drunk too much, and asked them to drink a pot, offering to treat them if they would but drink with him: whereupon they, believing him to be really drunk, left him, and went forward again, and he still followed them till they came to Cœ (Kew) ferry, and when they were in the boat, discovered them, so that they were both seized and committed; by which means the gentleman got again all they had taken from him."

reign, was voted by a great majority duly elected for Gloucestershire, in direct contravention of the legal forms of inquiry into election petitions, passed on the motion, and mainly by the agency, of the Solicitor-General, and exposed him to no little scandal. He was often, Speaker Onslow informs us, reproached with it to his face;—"but," adds the same authority, with a severity justified by a review of Lord Harcourt's political career,—“he was a man without shame, though very able.” It was not very long, as we shall see presently, before he was paid for his conduct in this transaction, in the self-same coin.

His practice at the bar, up to the period of his appointment to office, appears, if we may judge by the unfrequent occurrence of his name in the King's Bench Reports, to have been by no means extensive. Throughout Lord Raymond's Reports, extending without a break from 1694 to 1703, in which the names of counsel are almost always given, his occurs scarcely half a dozen times, and the earliest of these is in Trinity Term 1700; and the only case in which it is to be found in the State Trials is in conjunction with no fewer than six other counsel, in defence of Mr. Duncombe, the Receiver-General of the Excise, charged with defrauding the revenue by false indorsements on Exchequer Bills, in 1699. It is to be considered, however, that in the reports of courts of equity, in which probably his principal practice lay, the counsels' names are very rarely noted. His patrimonial fortune, diminished as it had been by the inroads made upon it during the civil wars, still remained, doubtless, sufficient to relieve him from the necessity of subjecting himself to the *drudgery* of bar practice, and his duties in Parliament, more congenial both to his talents and his ambition, scarcely permitted him to pay an undivided attention to professional employments, even if it had been necessary. By his appointment as Solicitor-General, he secured a considerable accession of income, without being compelled to much increase of professional labour. The emoluments of the law officers of the crown, although not so ample as they had been under the reigns of the last Stuarts, when the Attorney-General's profits amounted to about £7000 a year (a sum equivalent to nearly twice as much at the present day), were still very considerable, and exceeded the salaries of

any of the common law judges. The latter, however, had now obtained some compensation in the comparative certainty of enjoyment which the legislature had secured to their offices.

The first occasion on which we find the talents of the new Solicitor-General called into exercise in parliament, was in the memorable debates on the case of Ashby and White, when, as may be surmised, he appeared as a strenuous supporter of the jurisdiction claimed by the Commons; and moved the resolution adopted by the House, "that the sole right of examining and determining all matters relating to the election of members to serve in parliament, except in such cases as were otherwise provided for by act of parliament, was in the House of Commons, and that neither the qualification of the electors, nor the right of the persons elected, was elsewhere cognizable or determinable:"—a position, the correctness of which, when limited to the proper object of the parliamentary jurisdiction, the determining who were rightly elected, was not impeached by the Whigs. His speech on this occasion, though plausible and clever, is not very remarkable for argument. Not long afterwards, the project of the union with Scotland was formally submitted to Parliament. Harcourt was employed to draw the bill, which he did so ably and ingeniously as to cut off all debate upon those of its provisions to which the opposition had determined to object. The preamble was made to contain a recital of the articles of union passed in Scotland, and of the acts made in both parliaments for the security of their several churches; and then came a single enacting clause ratifying them all. Thus the recital, being mere matter of fact, afforded no room for objection; and the objectors did not venture to oppose the general enacting clause *in toto*, and found such difficulty in fixing on particular points, and introducing provisos applicable to them, that the bill, pushed forward with much zeal, passed the Commons before they had recovered from the surprise into which the form it was drawn in had thrown them. We may infer from the expressions of Burnet that the credit of this management was mainly, if not altogether, due to Harcourt.

He filled about this time the chair of the Buckinghamshire quarter-sessions; his manuscript notes of his charges to the grand jury at the several sessions from Midsummer 1704

to Michaelmas 1705, are preserved in the British Museum, and would contrast amusingly with a quarter-sessions' charge at the present day. Aiming at far higher topics than county rates and beer-houses, the burden of their song is the excellencies of the constitution, the church, and the laws, the perfections of the queen, and the glories of the war. "The government of England" (thus the first sets out) "is the happiest constitution in the world, for the admirable frame and wisdom of the laws: for by them all ranks and degrees of men are insured in the liberty of their persons and the property of their estates.—How much happier, gentlemen, are we than our neighbours, who groan under insupportable miseries, even to the last degree of slavery, while we live in ease and hospitality, and eat the fruit of our own vine. *All which* we owe to the wisdom of our ancestors; and take care that those laws by which we enjoy this happy state should have a due obedience paid them, for they will stand us in no stead without an honest, prudent, and impartial administration.—You, gentlemen, must enable us to put them in force by your presentments, else we cannot correct and punish the several offenders in our county. You are the eye of the county, and it may justly be presumable that no offence can be committed there but which must come to the knowledge of some of you, &c. &c. As, gentlemen, we are blessed with such good laws, so we are under the most auspicious reign of the best of queens (whom God long preserve); a queen who will impartially put them in execution; a queen who is a zealous professor of the religion of the Church of England as established by law, and will always be a promoter of its honour and interest; and a queen who wishes from the very bottom of her breast there were no separatists from it in her dominions," &c. &c.

These weighty truths the gentry of Buckinghamshire ran little risk of forgetting; for we find them imported in full into all the subsequent charges, each being referred to by the initial words of the paragraph, thus:—

"The government of England.

How much happier, gentlemen.

All which we owe.

You, gentlemen, must enable us.—"

and so forth; with variations to suit the particular topic of the

time, such as a declamation upon the victory of Blenheim or the surprise of Gibraltar, a lament over the thrice-rejected bill against occasional conformity, or an electioneering tirade against schismatic and lukewarm churchmen, giving note of the declension of Tory predominance.

This last appeal, as far as it regarded Sir Simon's own electioneering interests, was without effect: on the general election in the summer of 1705, he lost his seat for Abingdon, but was returned by the government interest, in that and the following parliament, for Bossiney. It was about this period that the series of intrigues and machinations was set on foot by Harley and his ally Mrs. Masham, which ended in the dismemberment of Lord Godolphin's ill-assorted cabinet. Of these Harcourt was a zealous and busy abettor, and lent all his efforts to persuade the leaders of the Tory party into the interests of the intriguers. These arts were for the present unsuccessful, and Harley and St. John were compelled to withdraw from office until their schemes should be more fully matured. Harcourt, who had in the last year (April 23 1707) been advanced to the post of Attorney-General on the dismissal of Sir Edward Northey, had now scarcely any alternative but to quit it in company with his confederates; which he did with a formality of which there is no other recorded precedent—by a surrender of his patent by deed enrolled in Chancery; designed, we suppose, to attest the entire voluntariness of the sacrifice, since he could scarcely deem such a ceremony requisite in law. Had the mine been sprung more successfully, there is no doubt that the plot comprehended the removal of Lord Cowper from the woolsack, and the elevation of the Attorney-General in his room. Although, however, the views of the confederates were defeated for the time, they retired with little fear, supported by the prejudices of the queen and the co-operation of her favourite, of carrying them into effect more securely. At present, matters appeared to go wrong in more ways than one with the dispossessed Attorney-General. In the parliament which assembled in November 1708, he was again returned for Abingdon; but on a petition lodged against his return by the government candidate, he was unseated, after two days' long and angry debate in a very full

house,<sup>1</sup> by a determination as illegal and corrupt as that of which he himself had been the author six years before. Finding the turn the matter was about to take, he took his leave of the house in a short speech of great spirit and severity—the only portion preserved of the debate :—

“ Whatever the determination of this House may be, this I am sure of, and it must be admitted, that I am duly elected for the borough of Abingdon as ever any man was. Had it been the pleasure of the House to have construed the charter under which this election is made, according to the natural and plain words of it, as the inhabitants have always understood it,—in such a sense all former Parliaments have frequently expounded it,—had you determined the right of election to be in those persons who have without any interruption exercised it for 150 years, you could not have insisted that I had not the majority. Even as you have determined the right, my majority is still unquestionable. No gentleman, with reason, can disprove my assertion, whatever reason he may have to refuse me his vote. You have been truly informed, the petitioner, on closing the poll, declared he did not come there with any prospect of success. But any opposition may give a handle to a petition ; no matter for the justice of it, power will maintain it. Whoever sent him on such an errand,<sup>2</sup> what mean and contemptible notions must he entertain of the then ensuing Parliament ! he must suppose them capable of the basest actions, of being awed and influenced by menaces or promises, of prostituting their consciences at the word of command. Had there been such a Parliament elected, and I declared not duly elected, I should then have left my place with a compassion for the unfortunate friends that stayed behind me : whoever could have framed such a project to himself must undoubtedly have wished for, perhaps have wanted, such a Parliament. He must have been a person, the most abandoned wretch in the world, who had long quitted all notions of right and wrong, all sense of truth and justice, of honour and conscience. Whatever his dark purposes were, it is our happiness and the nation's that they were entirely disappointed in the choice of this Parliament. I cannot directly point him out, but whoever he was, I have so much charity as sincerely to wish he may feel, and be truly sensible of the impartial justice

<sup>1</sup> We need scarcely remind our readers that the jurisdiction in election cases was not transferred to a select committee until the passing of the Grenville Act in 1770.

<sup>2</sup> Lord Wharton, who exercised a gross interference in the elections in that part of the country, is doubtless aimed at here.



and honour of a British Parliament." [He then summed up the poll on both sides, and demonstrated that the counsel for the petition had left him the majority of two votes, and had added several unquestionable votes to his own poll.]

The reign of Queen Anne was not fruitful in state prosecutions; and the only occasions on which we meet with Sir Simon Harcourt in the State Trials, during his employment as a crown officer, are the trials of the parties implicated in the forcible marriage of Mrs. Pleasant Rawlins, in 1702; of Mr. Lindsay, for treason in returning into the realm without a licence, in 1704; and of Tutchin, the libellous publisher of the *Observer*, in the same year. In the last case the queen's counsel seemed to have revived the old prerogative strain which had been in use under the Stuarts. Montague, the defendant's counsel, was attempting to put an innocent construction on various parts of the libel:—"But," says the Solicitor-General, "Mr. Montague says nothing of 'the prerogative the people have that the representatives are the judges of the mal-administration of their governors; that they can call them to account, and can appoint such to wear the crown who are fittest for government;—he passes by all this scandalous matter.'" "I did so, Mr. Solicitor," rejoins Montague, "and I did it on purpose, because I look upon it as a matter not proper for you and me to talk of as advocates in this place. I think the rights of the princes and the power of the people too high topics for me to meddle with." The Attorney-General (Northey) construing this into a covert justification of the doctrine complained of, takes occasion afterwards to say, "I am surprised to hear it justified here by a counsel that the people have power to call their governors to account. *I will always prosecute any man that shall assert such doctrines.*"—In the long and learned arguments which afterwards took place in the King's Bench as to the amendment of the process in Tutchin's case, the Solicitor-General appears to have borne no part.<sup>1</sup>

On the impeachment of Dr. Sacheverell, in 1709-10, Sir Simon Harcourt, in his character of leading Tory lawyer, was

<sup>1</sup> If poetical evidence might be trusted, we might conclude that Sir Simon enjoyed a considerable equity practice. The second book of Philips's poem on

selected for the chief conduct of the defence. His services, however, were necessarily withdrawn before the end of the trial; just as he concluded his opening speech for the defence, he had notice that he was returned to parliament for Cardigan; it was said indeed by some that he knew it before he began. He engaged in the case with a zeal and acrimony doubled by resentment of his recent extrusion from the House of Commons. His speech was necessarily rather that of a rhetorician than an orator, but it deserves the praise of having made the best of an indifferent case. He urged, in the first place, that the doctor's assertion of the illegality of resistance, on any pretence whatever, to the supreme power, was in fair construction to be understood as applying only to the supreme *legislative* power, in which sense there was no resistance even at the Revolution; but even if it must be understood as said of the executive, he had not in terms applied it to the particular case of the Revolution; that while inculcating the general rule of obedience, he had not deemed it necessary to express the particular exceptions for extraordinary occasions which might lawfully be made out of it, and which were more properly to be implied, as was the case in every other general rule: thus the apostles, enjoining obedience to rulers, masters, and parents, did not consider it necessary to specify the cases in which such obedience might be unfit or even sinful, but left them to justify themselves when they occurred. He then proceeded to insist, on the authority of citations from the homilies and articles of religion, from the writings of divines of almost every age, and from numerous statutes, that the doctrine thus propounded by his client had the sanction of both church and law. The doctor himself evinced the high value he set upon his counsel's services by presenting him with a massive gilt bason, (for washing

Cyder (published in 1706) opens with an invocation to the younger Harcourt, then in Italy, to return and grace his native land with "Latian knowledge":—

"Return, and let thy father's worth excite  
Thirst of pre-eminence; see how the cause  
Of widows and of orphans, he asserts  
With winning rhetoric, and well-argued law!"

The monument to Philips's memory in Westminster Abbey was erected at Lord Harcourt's expense, as the stone itself rather ostentatiously informs us.

after dinner,) having a complimentary Latin inscription engraved on the inside of the bottom, which was modelled in the form of an altar.<sup>1</sup> He had even a better title to the doctor's gratitude, for he shortly afterwards (ineffectually indeed) solicited a bishopric for him from the queen. The speech delivered by Sacheverell himself is said to have been the joint composition of Drs. Atterbury, Smalbridge and Friend, revised by Harcourt and Sir Constantine Phipps.

These ill-advised proceedings gave the *coup-de-grace* to Godolphin's ministry, which had so long been tottering, and the road to power was once more open to the displaced Tories. In the general election this year (1710) Harcourt was once more returned for Abingdon; but before he could be summoned to take his seat, he was called to repose on one more coveted and better *stuffed*. The determination with which the Lord Chancellor Cowper resisted Harley's persuasions to remain in office after the expulsion of his colleagues, gave hopes of a speedy vacancy on the woolsack, the succession to which Sir Simon had long regarded as his own. Swift, in his *Journal to Stella*, under the date of Sept. 14, writes, "We hear the Chancellor is to be suddenly out, and Sir Simon Harcourt to succeed him." Harley determined, however, not

1 " Viro honoratissimo,  
universi juris oraculo,  
Ecclesiæ et regni præsidi et ornamento,  
Simoni Harcourt equiti aurato,  
Magnæ Britanniæ sigilli magni custodi,  
et serenissimæ Reginæ è secretioribus consiliis ;  
Ob causam meam coram supremo senatu  
in aulâ Westmonasteriensi  
nervosâ cum facundiâ et subdolâ legum scientiâ  
benignè et constanter defensam ;  
Ob priseam ecclesiæ disciplinam,  
inviolandam legum vim,  
piam subditorum fidem,  
et sacrosancta majestatis jura,  
contrâ nefarios perduellium impetus  
feliciter vindicata,  
votivum hoc manulavacrum,  
perpetuum fortitudinis pignus,  
D. D. D.  
devinctissimus cliens  
Henricus Sacheverell S. T. P.  
Anno salutis MDCCX."

yet to relinquish the hope of effecting a compromise between the two parties, and a few days afterwards Harcourt found himself obliged to accept for the present his old place of Attorney-General, on the resignation of Sir James Montague. This was on the 19th; on the 23d, the Chancellor, having opposed in vain the issuing of the proclamation to dissolve the parliament, absolutely refused to retain the seals. They were accordingly, after much ineffectual remonstrance, received by the queen; but instead of being delivered over to the expecting Attorney-General, were put into the hands of Commissioners. Harley still, it seems, cherished a lingering hope that some of the Whig leaders might be brought to terms, and St. John was therefore kept out of his promised secretaryship of state, as Harcourt was held back from the woolsack. The two mortified expectants accordingly laid their plans together to defeat this unwelcome arrangement. They expressed their determination to withdraw their services altogether, unless their claims were attended to; and prepared to go down into the country forthwith, leaving instructions with Granville, (afterwards Lord Lansdowne,) an intimate acquaintance of both parties, to forward their designs by showing himself cool and reserved to Harley, which he engaged to do. The same evening, however, Granville posted to Harley, and gave him notice of their determination. The result was, that "they were satisfied and stayed in town;" on the 18th of October the great seal was delivered to Harcourt with the title of Lord Keeper, and the next day he was sworn of the Privy Council; but neither he nor St. John forgot that their appointments had been extorted rather than bestowed.

On the meeting of parliament in November, the new Lord Keeper had the misfortune ignorantly to offend against the etiquette of the peerage, and to incur the solemn reproof of the old Earl of Rochester (the queen's maternal uncle and president of the council) for having presumed, not being himself a peer by patent, to introduce the Scotch representative peers to the queen's presence. Lord Cowper good-naturedly came to his assistance, and maintaining that he had a right as Lord Keeper to act as he had done, and had committed no breach of etiquette, no further notice was taken of the matter. Being unable to take part in the debates, except

to put the questions, the only occasion on which his oratory was called into exercise during the session was that of presenting the thanks of the House to Lord Peterborough for his successes in Spain, in the course of which he took occasion to throw out an ungenerous taunt against Marlborough:—

“ The present I am now offering to your lordship is the more acceptable as it comes pure and unmixed, and is unattended with any *other* reward, which your lordship might justly think would be an alloy to it.” Swift’s journal and correspondence afford us at this period an amusing insight into the daily life of the ministerial leaders, who, whatever were their secret causes of dissatisfaction, lived on external terms of the most cordial familiarity. After Harley’s escape from the knife of Guiscard, the “ Old Saturday Club” was formed, consisting of a few of his most intimate political associates, who met every Saturday to dinner at his house, and discussed state matters over the wine. The only original members were Harley himself, the Lord Keeper, St. John, Lord Rivers, and Lord Peterborough. Swift was very early added to the number, and for some time the *entrée* was confined to these; by and bye, other persons of rank of the Tory party were admitted, and the meetings became less and less devoted to politics, and at last of an entirely Bacchanalian character. Harley’s devotion to the bottle is well known, and Harcourt appears to have borne it an almost equal affection. Even Swift’s shrewd observation was for a time deceived into the belief that all this show of good fellowship arose out of a sincere and cordial good understanding among the three ministers. He says, in a letter to Lord Peterborough, Feb. 1711, “ I am sometimes talked into frights, and told that all is ruined, but am immediately cured when I see any of the ministry . . . . My comfort is, they are persons of great abilities, and they are engaged in a good cause. And what is one very good circumstance, as I told three of them the other day, they seem heartily to love one another, in spite of the scandal of inconstancy which court friendships lie under.” But the scene was speedily changed. In a letter to the same nobleman, dated no later than the 4th of May following, he writes, “ Our divisions run farther than perhaps your lordship’s intelligence has yet informed you of; that is, a *triumvirate* of

our friends I have mentioned to you; I have told them more than once, upon occasion, that all my hopes of their success depended on their union; that I saw they loved one another, and hoped they would continue it, to remove that scandal of inconstancy ascribed to court friendships. I am not now so secure." And in the Journal to Stella, (Aug. 21,) "The Whigs whisper that our new ministry differ among themselves, and they have some reason for their whispers, although I thought it was a greater secret. I do not much like the posture of things; I always apprehended that any falling out would ruin them, and so I have told them several times." It was indeed little likely that there should be any cordial communion between the suspicious, dissembling, procrastinating coldness of Harley, and the brilliant and fiery ambition of St. John. And although the necessities of public business compelled the Treasurer to admit the Secretary of State to as much confidence as their uncongenial spirits would admit, this was never extended to Harcourt, whose unseasonable determination to possess himself of the great seal had never been forgotten. Even after he became Chancellor, he complained in bitter terms to Lord Lansdowne, that he knew no more of the measures of the court than his footman; that Lord Bolingbroke had not made him a visit of a year, and Lord Oxford did not so much as know him. In return for this distrust, he appears to have studiously confined his support of the government in parliament to his votes, for we scarcely find him opening his mouth in its cause while he was a member of it. In the "Inquiry into the Behaviour of the Queen's last Ministry," Swift admits the full extent of his own credulity. "There could hardly be a firmer friendship in appearance than what I observed between these three great men, who were then chiefly trusted; I mean the Lords Oxford, Bolingbroke, and Harcourt. I remember, in the infancy of their power, being at the table of the first, where they were all met, I could not forbear taking notice of the great affection they bore to each other. . . . I did not see how their kindness could be disturbed by competition, since each of them seemed contented with his own district; so that, notwithstanding the old maxim which pronounces court friendships to be of no long duration, I was confident theirs would last as long as

their lives . . . . But it seems the inventor of this maxim was a good deal wiser than I, who lived to see this friendship first degenerate into indifference and suspicion, and thence corrupt into the greatest animosity and hatred; contrary to all appearances, and much to the discredit of me and my sagacity."

On the elevation of Harley to the peerage, it was generally expected that the Lord Keeper would be his companion in dignity; and a lively *jeu d'esprit* of Swift's is extant, addressed to St. John, in which, "being convinced," as he informs him, "by certain ominous prognostics, that his life is too short to permit him the honour of ever dining another Saturday with Sir Simon Harcourt, Knight, and Robert Harley, Esquire," he begs to be allowed to take his last farewell of those gentlemen on the following day. The expected coronet was however withheld a little while longer from his grasp; Harley was ennobled alone, and at the same time received the staff of Lord Treasurer. When he came to take the oaths of office in the Court of Chancery, the Lord Keeper addressed him in a speech remarkable for the happiness with which the compliments were turned. The allusion to the ancestry of the new peer came with peculiar effect from one who himself also had some of the blood of the Veres flowing in his veins. The speech is too well known, if it were not too long, for transcription. A few months afterwards (Sept. 3d, 1711,) the Lord Keeper was himself advanced to the peerage, by the title of Baron Harcourt of Stanton Harcourt. The preamble to his patent was drawn up at considerable length, and in terms of the most exaggerated eulogy. Collins is however of opinion that it "sets forth his eminent abilities *without hyperbole*;"—our readers may judge from the sample transcribed below.<sup>1</sup>

<sup>1</sup> "He suffered in his paternal inheritance, which was diminished by the fury of the civil wars; but not in his glory, which being acquired by military valour, he, as a lawyer, has advanced by the force of his wit and eloquence; for we have understood, that his faculty in speaking is so full of variety, that many doubt whether he is fitted to manage causes in the lower Court, or to speak before a full Parliament: but it is unanimously confessed by all, that among the lawyers he is the most eloquent orator, and among the orators the most able lawyer . . . . Whom, therefore, furnished with such great endowments of mind, all clients have wished to defend their causes, not without reason we preferred to be one of our counsel-at law; whom we a second time called to be our Attorney-General, which office he had once before sustained with honour, as far as it was *thought convenient*; whom, lastly, since we perceived that all these things were inferior to the largeness of his capacity, we have advanced to the highest pitch of forensical dignity, and made him supreme



Not only had his Lordship, as his eulogist has recorded, advanced the glory of his family, but had managed tolerably to repair its damage; for in this same year he purchased from the Wemyss family, for the sum of £17,000, the manor and advowson of Nuneham Courtenay, in Oxfordshire, where his successor built and laid out the splendid mansion and park which have been ever since the principal residence of the family.

While the stability of the new administration was endangered by internal dissension, it had become also the object of distrust to the thoroughgoing Tories, who were satisfied with nothing short of a "clean sweep" of the Whigs out of every remnant of place, and demanded not only ascendancy for their own party, but retaliation and persecution upon their opponents. To compel the ministry into these measures, they formed themselves into an association of about a hundred, under the name of the October Club. Swift's pen was employed to reason with the intemperate zeal of these dangerous allies, and the "Advice to the October Club, by a Person of Honour," was accordingly published in the winter of 1711. Its title, and certain allusions to the supposed writer's previous personal efforts to persuade the parties into moderation, caused the pamphlet to be attributed (as was the intention of those in the secret) to Lord Harcourt, and it is accordingly ascribed to him by most of the contemporary historians. The peace of Utrecht buoyed up the unsteady ministry for a time, but their increasing dissensions made it manifest that their league could be of no long duration. In the midst of these, however, Harcourt, whom it probably became desirable for the Treasurer to endeavour to conciliate in some degree, was gratified (April 7th, 1712,) with the dignity of Lord Chancellor. There is little doubt, although the proofs are not so direct with regard to him as some other members of the government, Judge in our Court of Equity. He still continues to deserve higher of us and of all good men; and is so much a brighter ornament to his province, as it is more honourable than the rest he has gone through: he daily dispatches the multitude of suits in Chancery, he removes the obstacles which delay judgment in that Court, and takes special care that the successful issue of an honest cause should cost every plaintiff as little as need be: Therefore, that the most upright assertor of justice may not be without a vote in the most supreme Court; that he who can think and speak so excellently well, should not be silent in an assembly of the eloquent, we grant him a place among the Peers," &c. &c.

time, such as a declamation upon the victory of Blenheim or the surprise of Gibraltar, a lament over the thrice-rejected bill against occasional conformity, or an electioneering tirade against schismatic and lukewarm churchmen, giving note of the declension of Tory predominance.

This last appeal, as far as it regarded Sir Simon's own electioneering interests, was without effect: on the general election in the summer of 1705, he lost his seat for Abingdon, but was returned by the government interest, in that and the following parliament, for Bossiney. It was about this period that the series of intrigues and machinations was set on foot by Harley and his ally Mrs. Masham, which ended in the dismemberment of Lord Godolphin's ill-assorted cabinet. Of these Harcourt was a zealous and busy abettor, and lent all his efforts to persuade the leaders of the Tory party into the interests of the intriguers. These arts were for the present unsuccessful, and Harley and St. John were compelled to withdraw from office until their schemes should be more fully matured. Harcourt, who had in the last year (April 23 1707) been advanced to the post of Attorney-General on the dismissal of Sir Edward Northey, had now scarcely any alternative but to quit it in company with his confederates; which he did with a formality of which there is no other recorded precedent—by a surrender of his patent by deed enrolled in Chancery; designed, we suppose, to attest the entire voluntariness of the sacrifice, since he could scarcely deem such a ceremony requisite in law. Had the mine been sprung more successfully, there is no doubt that the plot comprehended the removal of Lord Cowper from the woolsack, and the elevation of the Attorney-General in his room. Although, however, the views of the confederates were defeated for the time, they retired with little fear, supported by the prejudices of the queen and the co-operation of her favourite, of carrying them into effect more securely. At present, matters appeared to go wrong in more ways than one with the dispossessed Attorney-General. In the parliament which assembled in November 1708, he was again returned for Abingdon; but on a petition lodged against his return by the government candidate, he was unseated, after two days' long and angry debate in a very full

house,<sup>1</sup> by a determination as illegal and corrupt as that of which he himself had been the author six years before. Finding the turn the matter was about to take, he took his leave of the house in a short speech of great spirit and severity—the only portion preserved of the debate :—

“ Whatever the determination of this House may be, this I am sure of, and it must be admitted, that I am duly elected for the borough of Abingdon as ever any man was. Had it been the pleasure of the House to have construed the charter under which this election is made, according to the natural and plain words of it, as the inhabitants have always understood it,—in such a sense all former Parliaments have frequently expounded it,—had you determined the right of election to be in those persons who have without any interruption exercised it for 150 years, you could not have insisted that I had not the majority. Even as you have determined the right, my majority is still unquestionable. No gentleman, with reason, can disprove my assertion, whatever reason he may have to refuse me his vote. You have been truly informed, the petitioner, on closing the poll, declared he did not come there with any prospect of success. But any opposition may give a handle to a petition; no matter for the justice of it, power will maintain it. Whoever sent him on such an errand,<sup>2</sup> what mean and contemptible notions must he entertain of the then ensuing Parliament! he must suppose them capable of the basest actions, of being awed and influenced by menaces or promises, of prostituting their consciences at the word of command. Had there been such a Parliament elected, and I declared not duly elected, I should then have left my place with a compassion for the unfortunate friends that stayed behind me: whoever could have framed such a project to himself must undoubtedly have wished for, perhaps have wanted, such a Parliament. He must have been a person, the most abandoned wretch in the world, who had long quitted all notions of right and wrong, all sense of truth and justice, of honour and conscience. Whatever his dark purposes were, it is our happiness and the nation's that they were entirely disappointed in the choice of this Parliament. I cannot directly point him out, but whoever he was, I have so much charity as sincerely to wish he may feel, and be truly sensible of the impartial justice

<sup>1</sup> We need scarcely remind our readers that the jurisdiction in election cases was not transferred to a select committee until the passing of the Grenville Act in 1770.

<sup>2</sup> Lord Wharton, who exercised a gross interference in the elections in that part of the country, is doubtless aimed at here.

Come, trimming Harcourt, bring your mace,  
 And squeeze it in, or quit your place;  
 Dispatch, or else that rascal Northey  
 Will undertake to do it for thee:  
 And be assured, the court will find him  
 Prepared to *leap o'er sticks*, or bind 'em."

The doctor's correspondence with Erasmus Lewis, the secretary and a staunch adherent of the Lord Treasurer, portrays amusingly the last scenes of the intrigue. Thus, under the date of July 17 (1714), Lewis writes;—"The great attorney who made you the sham offer of the Yorkshire living,<sup>1</sup> had a long conference with the Dragon<sup>2</sup> on Thursday, kissed him at parting, and cursed him at heart. He went to the country yesterday; from whence some conclude that nothing will be done soon." The Queen, however, having been made acquainted with Oxford's negotiations with the Whig lords, Lord Harcourt was sent for in great haste to town; and at a cabinet meeting in the Queen's presence the following day, the most vehement reproaches passed between the Treasurer on the one side, and Lady Masham and the Chancellor on the other,—the former declaring that "he had been foully wronged and abused by lies and misrepresentations, but he would be revenged, and leave some people as low as he found them." Lewis writes, July 22d;—"They eat and drink and walk together, as if there were no sort of disagreement; and when they part, I hear they give one another such names as nobody but ministers of state could bear without cutting throats." And two days afterwards,—“The moment I had turned this page, I had intelligence that the dragon has broke out in a fiery passion with my Lord Chancellor; sworn a thousand oaths he would be revenged, &c.” On the 27th Lord Oxford was deprived of his staff: but the Queen, who had been long in a weak state of health, shaken and enfeebled by these scenes of violence and animosity, was in three days more upon her death-bed. On the first of August she died, and the whole scheme of treachery and selfishness became at

<sup>1</sup> Swift had been led to expect a presentation to a valuable Yorkshire living out of the patronage of the Chancellor.

<sup>2</sup> A nickname expressive of the wily and dissembling character of the Treasurer, —Bolingbroke's common appellative, *Mercurialis*, was no less applicable to him.

once abortive. "The Earl of Oxford was removed on Tuesday," writes Bolingbroke a few days afterwards to Swift,—"the Queen died on Sunday.—What a world is this, and how does fortune baffle us!"

On the arrival of the new sovereign, the Chancellor, who had exercised during an interval of six weeks the dignified functions of head of the regency, repaired in all state to meet him at Greenwich, carrying with him, as some possible passport to favour, the patent for the young Prince of Wales's peerage; but was received with the most mortifying coldness, and was one of the few lords who, when the King had retired to his chamber, were not called in to pay him their personal congratulations. Scarcely had he set foot in St. James's, than, without further communication of any sort with the Chancellor, Lord Townshend arrived at his house to demand the great seal, which was instantly transferred to Lord Cowper; and the same day his name was struck out of the list of privy councillors.

The consideration of Lord Harcourt's judicial character and qualifications need not detain us long. His professional learning, never very assiduously cultivated, was undoubtedly not of the first order. The present Chancellor has estimated him truly as "a respectable lawyer, but not to be ranked with the Parkers, the Finches, or the Hardwickses." He appears, indeed, to have been not entirely unconscious of his deficiency of legal knowledge, since we find him on several occasions seeking support in the judgment of the Master of the Rolls, Sir John Trevor. In one case, for instance, having expressed an opinion that certain process issued against a wife during her husband's absence abroad was irregular, but being met by an observation from counsel which staggered him, "my Lord Keeper said, he would ask the Master of the Rolls his opinion, *and be governed by that*. Afterwards the Master of the Rolls coming into Court, was clearly of opinion that the process was regular, and said the practice of the Court *had been constantly so*,"—and so accordingly the case was determined. In another matter, on which the Master of the Rolls had already adjudicated, "my Lord Keeper coming into Court, and being asked his opinion, said he was of the same opinion, *to prevent a rehearing*" before himself. Not

a few instances occur in which the reporters express the dissatisfaction of the bar at his decrees, and an unusual number of them were reversed upon appeal, or have been overruled by subsequent authorities. Nor did he compensate for these deficiencies by any extraordinary assiduity in dispatching the business or reforming the abuses of his Court. The number of his decisions does not much exceed the half of those pronounced during the same period of time immediately before and after his four years' occupation of office. Of any attempts to remedy the grievances of the Court, even in the department within his own direct control, that of its *practice*, he was as guiltless as any of his predecessors. Mr. Parkes observes, in his History of the Court of Chancery, that "there is a singular interregnum, or chasm in the collection of orders, with the exception of two which are immaterial, from the year 1701 to 1721. One short order only, by Lord Harcourt, appears in Mr. Beames's volume. As these corrective mandates were the only partial reform and improvement in the practice, the absence of all addition to them is a proof of the culpable negligence of the Chancellors of that period, and a presumption that the abuses of the Court not only were continued, but by such neglect materially increased."—By those, however, who speak most unfavourably of his character, the virtue of judicial integrity is conceded to him. On Lord Macclesfield's impeachment in 1725, when some inquiry took place into the alleged sale of two Masterships in Chancery in Lord Harcourt's time; it clearly appeared, that in neither case the funds of the suitors had been invaded or endangered, nor were the sums paid greater than long usage—however indefensible—had sanctioned: and it was not in an age of almost universal corruption and venality that any special exercise of self-denial in such a case was to be expected.

Lord Harcourt was now of course leagued heart and hand against the government which had so unceremoniously displaced him. Perhaps, however, amidst the retaliatory measures adopted against his party, he did not feel himself so perfectly secure as to take at once any very openly active part in opposition; for we scarcely meet with his name in the debates, until the proceedings on the impeachment of Lord Oxford, (June 1717,) furnished him with an opportunity of

cancelling some portion of his old injuries towards his fallen colleague. For the purpose of raising an issue between the two Houses which might serve as the ostensible cause of defeating the proceedings altogether, and representing that it would be a great hardship upon the noble prisoner to appear every day at the bar as a traitor, and be at last probably found guilty, if at all, only of high crimes and misdemeanors, he moved that the Commons should not be admitted to proceed to proof of the articles for high crimes and misdemeanors, until judgment had been first given upon the articles for high treason. The motion, by the connivance of the government, was carried without difficulty; the Commons, as had been foreseen, insisted on their right to proceed after their own course, and refused to be parties to that laid down for them: the form of a trial was gone through, no accuser appearing, and the Earl took an easy leave of his two years' sojourn in the Tower.

The discussion of the Mutiny Bill, in the following session, gave rise to frequent and warm debate, in which Lord Harcourt appeared on several occasions in vehement opposition to the measure, especially to the clauses investing courts-martial with power over the life and person of the soldier: uttered much patriotic declamation in praise of trial by jury, and inveighed against the dangerous and unconstitutional designs to which alone the establishment of this extraordinary judicature, and the maintenance of so large a standing army, could reasonably be attributed. His name, however, is affixed to few of the protests which crowd the journals at this period, and which served to distinguish those of the opposition peers who desired to be understood as uncompromising and irreconcilable adversaries of the ministerial policy. We shall see presently that this was a character to which *his* opposition had indeed little title.

In the year 1720, he sustained a severe blow in the death of his only son, of whom we have before spoken, and whose talents and accomplishments appear to have been such as might justly make his early loss a subject of deep regret. We learn that he bore an extraordinary personal resemblance to his father. Gay, in his poem addressed to Pope on the completion of his *Homer*, in which he describes all the poet's friends as



assembled to welcome his return from Greece (an imitation of the 46th Canto of the Orlando Furioso), introduces among them the two Harcourts—

“Harcourt I see, for eloquence renown’d,  
The mouth of justice, oracle of law!  
Another Simon is beside him found,  
Another Simon, like as straw to straw.”

Pope’s epitaph, inscribed upon his monument at Stanton Harcourt, is known to every reader of poetry. It received divers corrections at the hands of Lord Harcourt, who appears to have been but indifferently satisfied with it when first submitted to his criticism. For instance, the sixth line—

“Since Pope must tell what Harcourt cannot speak”—  
stood originally—

“Harcourt stands dumb, and Pope is forced to speak”—  
until recast by his lordship’s desire, his ear being especially displeased with the not very euphonious participle “forced.” The “father’s sorrows” recorded in the epitaph had doubtless tolerably subsided during the two years which had elapsed since his loss, or might not unreasonably have rested some imputation upon the sincerity of a sorrow which could busy itself in the trivialities of verbal criticism over the grave of an only son.

We now arrive at the period of Lord Harcourt’s political life which most of all needs an apology, if indeed any apology could avail to excuse the prostitution of public any more than of private character and honour. Sir Robert Walpole, who, if he rated public virtue at somewhat too cheap an estimate when he affirmed that every man had his price, at least had a special faculty of discovering those who *had*, thought he perceived some symptoms which indicated that Lord Harcourt’s opposition was not so inexorable as to be proof against the persuasives he had it in his power to apply to it. He was not mistaken. On the 14th of July, 1721, his lordship, advanced to the dignity of a viscount, with a pension swelled from two to four thousand a year, transferred himself without difficulty from the opposition to the ministerial bench, and was heard in ready defence of the self-same measures which he had denounced not long before as destructive of his country’s liberties. To see political weighed in a different scale from personal in-

tegrity, even by men of the highest dignity of rank and station—to see the hand that would reject with indignant scorn the bribe of the suitor, close without difficulty upon the pension of the minister,—is a spectacle too common to excite our surprise, however deeply it may challenge our reprobation, and however degrading the estimate which its frequency has fixed upon the character of public men in this country. It would seem that Lord Harcourt's conduct was foreseen by his friends. Prior writes to Swift, in April 1721, "The bishop [Atterbury, who was also, but with less justice, suspected of a design to go over to the ministry,] cannot be lower in the opinion of most men than he is; and I wish our friend Harcourt were higher than *he* is." His first piece of service to the court consisted in an ineffectual attempt to screen Aislachie, the corrupt abettor of the South Sea frauds, from the penalties of his delinquency. On all the questions agitated in the following session—the Navy Debt, the Spanish Treaty, the Quarantine Act, &c. &c.—he was a frequent speaker in support of the administration. The very Mutiny Act, on which three years before he had expended so much indignant patriotism, he now discovered to be necessary to the support of the government, and forgot that it was an invasion of the rights of the people. Not long afterwards came the proceedings against Atterbury, no less objectionable in their character and tendency, and even more destitute of foundation in legal proof, than those which Harcourt had himself denounced with such zeal and force in the case of Sir John Fenwick. Here, however, we find him recording his practical denial of the principles for which he then contended; and that against the intimate associate of his former life, whose bishopric had been conferred at his own solicitation, in reward of those very principles and opinions which now *he*, at least, could only accuse the bishop of having followed up more consistently and unflinchingly than himself.

From the view of his political career, thus sullied by an unworthy abandonment of principle, it is far more grateful to turn to that of his private life, passed in familiar communion with almost all the wit and genius of his time. His intimacy with Swift has been already seen; with all the other literary ornaments of that age, from whom the divisions of party did not

absolutely estrange him,—Pope, Prior, Gay, Parnell, Arbuthnot, &c. &c.—he lived on terms of no less familiar intercourse. Of these, Pope at least, and probably most of the others, owed their acquaintance with him to Swift's introduction. "Of my later friends," Pope writes to the Dean, in 1723, "the greater part are such as were yours before; Lord Oxford, Lord Harcourt and Lord Harley, may look upon me as one entailed upon them by you." At the old mansion-house of Stanton Harcourt, which had remained unoccupied by the family since Sir Philip's death in 1688, but of which a few rooms continued habitable, Pope fixed his retreat during the summers of 1718 and 1719, and translated there the latter volumes of his *Iliad*. Gay was at the same time domiciled at Lord Harcourt's neighbouring house of Cockthorpe, and they were almost the only visitors admitted to interrupt the poet in his laborious seclusion. It was here that the melancholy incident occurred of the death of two rustic lovers by lightning in the harvest field, which is described by Pope, with rather too much poetical finery, in a letter to Lady Mary Wortley Montague, and which Thomson afterwards wrought up into his ornamental episode of *Celadon and Amelia*. In the society of these distinguished friends, adorned also by the eloquent philosophy of Bolingbroke, the cheerful wit of Peterborough, the accomplished taste of Orrery, Lord Harcourt had far higher enjoyments within his reach than could reward him for a continued agitation in the strife of politics at the expense of consistency and honour, even with the additional gratifications of a pension doubled in amount, and the precedence of a viscount. That he was himself a man of polished taste and manners, and highly accomplished in general literature, although deficient probably in the more profound acquirements of scholarship and science, is discernible even in the few specimens which remain of his composition, and is abundantly confirmed by the testimony of his contemporaries.<sup>1</sup>

Although the minister had thus deemed it desirable to

<sup>1</sup> He has been himself quoted as possessed of no mean powers in poetry, on the strength of the commendatory verses bearing his name, which were prefixed to Pope's collected poems; we have little doubt, however, that the property in them belongs to his son, whom we have already seen in the character of a versifier. Lord Harcourt became possessed by bequest of Lord Chief Justice Herbert's library, said to have been a very valuable collection, particularly in law books.

silence Lord Harcourt's opposition, he was never so far valued or trusted as to be again put in possession of any office under the crown; he was re-admitted, indeed, to the council board, and on three several occasions appointed one of the Lords Justices for the administration of the government during the King's absence in his German dominions. He was the chief ostensible negotiator of Bolingbroke's recall from exile in 1725. The Duchess of Kendal, whose influence had been propitiated by a bribe of no less than £11,000, had secured the King's concurrence, and Harcourt, who had for some time maintained a confidential correspondence with the illustrious exile, was employed to move the matter in council. Walpole's urgent remonstrances were of no avail against the influence of the favourite; and that proud and restless spirit returned to exhaust itself in vain yearnings after the station and power from which it was excluded, and of which, amid the tranquil enjoyments of philosophic leisure, it affected to have abandoned the pursuit

“To low ambition, and the pride of kings.”

The sudden death of George I. left Walpole's tenure of power for a time extremely precarious, and it seemed probable that his trusty adherent, Lord Harcourt, might again be driven into the ungenial climate of opposition. Scarcely had he time to find this apprehension groundless, and to pay his homage at the court of the new sovereign, before he was himself hurried from the scene by the same stern summons. On Sunday, the 23d of July, 1727, as he was proceeding in his coach to visit Sir Robert Walpole at Chelsea, he was seized with a paralytic fit; and although he recovered so far as to regain the power of speech, and was even considered by the physicians to be out of immediate danger, he survived only until the following Friday, when he expired at his house in Cavendish Square, in his 67th year. His remains were conveyed to the vault of his ancestors at Stanton Harcourt.

The review we have taken of Lord Harcourt's public life furnishes the best estimate of his character. Of the vague praises of contemporary pamphleteers and poets, assiduously engaged in lauding those of their own party who had any thing to bestow, little account is to be made. A shrewd and not uncandid observer of character, who could at least have no personal prejudices or resentments to gratify by misrepre-

sentation (Speaker Onslow), while he speaks with high eulogy of Lord Harcourt's talents, pronounces a severe, but we can scarcely say an unjust, judgment on his principles and conduct:—"He was afterwards Lord Chancellor, with no character in any station but for his abilities, saving that of integrity in causes, which I never heard doubted. He had the greatest skill and power of speech of any man I ever knew in a public assembly."

There exists, as far as we are aware, no printed work from Lord Harcourt's pen. Among the Harleian MSS. in the British Museum, there is a small quarto volume of about 500 pages, entitled in the Catalogue "Sir Simon Harcourt's Common-Place Book for a Justice of Peace," and having the signature "Sim. Harcourt, 13 August, 1724," pasted into the first page,<sup>1</sup> evidently in the same handwriting with the manuscript itself. It consists of a collection of authorities on criminal law and practice, arranged under alphabetical heads after the manner of Burn's Justice. Many of the titles, however, are left in blank, and not more than about a third of the whole volume is written through. Under the title "Ale-houses," for instance, eight blank pages occur; under "Attainder," "Homicide," "Bastardy," &c. six or seven; and the whole appears a miscellaneous sort of compilation, without much attention to the arrangement of the subjects. In the same volume are bound up the charges to the Buckinghamshire grand jury, to which we have before referred.

Lord Harcourt was thrice married. By his first wife, Rebecca, the daughter of a Mr. Clark, he had three sons, Simon, whose death we have already mentioned, and two others who died in their infancy; and two daughters. By his other ladies he had no issue. He was succeeded in his titles and possessions by his grandson, who many years afterwards (Dec. 1st, 1749,) was advanced to an earldom. On the death of *his* grandson, the last venerable and gallant earl, without male issue, in the year 1830, all the honours of the family became extinct, and its possessions passed into the hands of the Vernons. In them, however, in compliance with his direction, the name of Harcourt survives, and may yet probably confer lustre upon a new line of nobility.

<sup>1</sup> The date assigned to the MS. in the Catalogue is 1705; the autograph date above-mentioned was most probably transferred from some other document.

## ART. III.—THE JUDGMENTS OF SIR GEORGE LEE.

*Reports of Cases argued and determined in the Arches and Prerogative Courts of Canterbury, and in the High Court of Delegates, containing the Judgments of the Right Honourable Sir George Lee.* By Joseph Phillimore, LL.D. 2 Vols. Saunders and Benning. 1833. •

SIR George Lee was the fifth son of Sir Thomas Lee, bart. of Hartwell, in the county of Buckingham. He was born in 1700; and after studying first at Clare Hall, Cambridge, and then at Christ Church, Oxford, he was, in Michaelmas Term, 1729, admitted an advocate in Doctor's Commons, and about the same time was returned to parliament as member for the borough of Brackley. Sir George Lee was much respected in the House, and attained some eminence as a speaker; but his political course, of which Dr. Phillimore gives a rapid review, is beside our present purpose.

• “ But neither political avocations, nor the business of the House of Commons, ever induced him to swerve from a close and indefatigable attention to his professional pursuits. His note-books, from his first admission into the profession, remain authentic monuments of extraordinary diligence and care. His business as an advocate was considerable; and his reputation so high, that on the death of Dr. Bettesworth in December 1751, he was made Dean of the Arches, and Judge of the Prerogative Court of Canterbury, by Archbishop Herring; soon after which he was knighted, and sworn a member of the Privy Council.

“ During the time he presided over the testamentary and matrimonial law of the country, he retained the same habit of industry which had distinguished him at the bar; throughout his whole judicial career he maintained the practice of inserting in note-books, a statement of the particulars of *every* case that was brought before him for judgment, a summary of the arguments of counsel, and a precis, as it were, of his own sentence. The following pages bring to the light exact transcripts from these manuscripts, valuable records of judicial in-

dustry, stamped as they are with the impress of care, deliberation, and sound legal attainments.

“ He filled the office of Dean of the Arches, and Judge of the Prerogative Court till the 18th day of December, 1758, on which day he expired suddenly while sitting in his chair, at his house in St. James's-square: he was buried at Hartwell.”<sup>1</sup>

“ These invaluable records of judicial industry,” writes Dr. Phillimore, “ were transmitted to me several years ago by his nephew and representative, the late SIR GEORGE LEE, of Hartwell, accompanied by a request that I would edit them if any opportunity should occur to me of so doing.

“ In giving them to the public at this moment, it appears to me, perhaps erroneously, that I may render an acceptable service to the profession in which I have toiled for so large a portion of my life. The judgments are deliberate but succinct, they are characterized by perspicuity and simplicity of style; are based in sound and extensive learning, and they afford a remarkable illustration of the uniformity of principle which has for so many centuries regulated the decisions of our highest ecclesiastical tribunals; inasmuch as if any individual will take the trouble of comparing these judgments, (and in the annotations which I have subjoined to many of them, I have endeavoured to direct the attention of the reader to this point,) with the decisions of the same courts which have been published in later times, he will scarcely be able to find one, which involves any point of law or any principle of practice, in which the decision is not to the same effect as it would have been if decided at the present day. I may also add, that from a careful examination of the abridgments of the pleadings and the evidence, which occur in these manuscripts, it will appear that justice, at that period, was administered in the Ecclesiastical Courts, purely and promptly, and, as compared with other courts, at a very moderate expense.”<sup>2</sup>

We venture to say, with some confidence, that Dr. Phillimore *has* rendered an acceptable service to his profession by the publication of these cases; their undoubted authenticity, and the care with which they are compiled, render them a valuable addition to our legal stores. In general, indeed, the

<sup>1</sup> P. xv.

<sup>2</sup> P. vii.



judgments do not possess the interest we expected, for the learned judge seldom gives the train of reasoning by which he arrived at his results, but only the results themselves; they are, therefore, rather to be consulted than read. But there are exceptions, and we will now extract and abridge one or two cases which we think will be generally interesting.

LINE v. HARRIS, vol. i, p. 146. The town of Saltash is wholly in the parish of St. Stephens; in Saltash is an ancient chapel of St. Nicholas, built on ground belonging to the corporation of that town, by whom the chapel had always been repaired and maintained; they paying the minister's stipend, the clerk, &c. They had also, during living memory, always nominated the chaplain or minister; but there was no evidence how their right originated. There was some proof that there had been occasionally christenings and marriages, and also burials, with the mayor's leave, in this chapel; but the right to perform those offices, parochially, was clearly not established. The inhabitants of Saltash paid Easter offerings and mortuaries to the vicar of St. Stephens. The vicar claimed the right to nominate the chaplain which was contested by the corporation.

Judgment.—Sir George Lee.

I took time to consider this case, and on this day, July 7th, 1752, I gave judgment thereon; I said that this appeared to me to be a chapel of ease; that its having sacraments and burials did not make it cease to be such, for though in Coke's 2 Inst. 363, it is said that when the question was whether it was *ecclesia* or *capella pertinens ad matricem ecclesiam*, the issue was whether it had *baptisterium et sepulturam*, for if it had the administration of sacraments and sepulture, it was in law judged a church; yet I did not take that to be law. The fact was evidently otherwise. Noy, 127, Buck v. Arn-cots. It appears that Rumford and Havering chapels are chapels of ease to Horne church, in Essex; and yet those chapels have sacraments and burials. So to my own knowledge, Uxbridge and Brentford, in Middlesex, are chapels of ease; the first to Hillingdon, the second to Ealing. And Totteridge, in Hertfordshire, is a chapel of ease to Hatfield; and yet in all those three chapels sacraments are administered, and marriages, burials, and all other ecclesiastical rites are performed. And this appears from the case of The Parish of Ashton v.

a few instances occur in which the reporters express the dissatisfaction of the bar at his decrees, and an unusual number of them were reversed upon appeal, or have been overruled by subsequent authorities. Nor did he compensate for these deficiencies by any extraordinary assiduity in dispatching the business or reforming the abuses of his Court. The number of his decisions does not much exceed the half of those pronounced during the same period of time immediately before and after his four years' occupation of office. Of any attempts to remedy the grievances of the Court, even in the department within his own direct control, that of its *practice*, he was as guiltless as any of his predecessors. Mr. Parkes observes, in his History of the Court of Chancery, that "there is a singular interregnum, or chasm in the collection of orders, with the exception of two which are immaterial, from the year 1701 to 1721. One short order only, by Lord Harcourt, appears in Mr. Beames's volume. As these corrective mandates were the only partial reform and improvement in the practice, the absence of all addition to them is a proof of the culpable negligence of the Chancellors of that period, and a presumption that the abuses of the Court not only were continued, but by such neglect materially increased."—By those, however, who speak most unfavourably of his character, the virtue of judicial integrity is conceded to him. On Lord Macclesfield's impeachment in 1725, when some inquiry took place into the alleged sale of two Masterships in Chancery in Lord Harcourt's time; it clearly appeared, that in neither case the funds of the suitors had been invaded or endangered, nor were the sums paid greater than long usage—however indefensible—had sanctioned: and it was not in an age of almost universal corruption and venality that any special exercise of self-denial in such a case was to be expected.

Lord Harcourt was now of course leagued heart and hand against the government which had so unceremoniously displaced him. Perhaps, however, amidst the retaliatory measures adopted against his party, he did not feel himself so perfectly secure as to take at once any very openly active part in opposition; for we scarcely meet with his name in the debates, until the proceedings on the impeachment of Lord Oxford, (June 1717,) furnished him with an opportunity of

cancelling some portion of his old injuries towards his fallen colleague. For the purpose of raising an issue between the two Houses which might serve as the ostensible cause of defeating the proceedings altogether, and representing that it would be a great hardship upon the noble prisoner to appear every day at the bar as a traitor, and be at last probably found guilty, if at all, only of high crimes and misdemeanors, he moved that the Commons should not be admitted to proceed to proof of the articles for high crimes and misdemeanors, until judgment had been first given upon the articles for high treason. The motion, by the connivance of the government, was carried without difficulty; the Commons, as had been foreseen, insisted on their right to proceed after their own course, and refused to be parties to that laid down for them: the form of a trial was gone through, no accuser appearing, and the Earl took an easy leave of his two years' sojourn in the Tower.

The discussion of the Mutiny Bill, in the following session, gave rise to frequent and warm debate, in which Lord Harcourt appeared on several occasions in vehement opposition to the measure, especially to the clauses investing courts-martial with power over the life and person of the soldier: uttered much patriotic declamation in praise of trial by jury, and inveighed against the dangerous and unconstitutional designs to which alone the establishment of this extraordinary judicature, and the maintenance of so large a standing army, could reasonably be attributed. His name, however, is affixed to few of the protests which crowd the journals at this period, and which served to distinguish those of the opposition peers who desired to be understood as uncompromising and irreconcilable adversaries of the ministerial policy. We shall see presently that this was a character to which *his* opposition had indeed little title.

In the year 1720, he sustained a severe blow in the death of his only son, of whom we have before spoken, and whose talents and accomplishments appear to have been such as might justly make his early loss a subject of deep regret. We learn that he bore an extraordinary personal resemblance to his father. Gay, in his poem addressed to Pope on the completion of his *Homer*, in which he describes all the poet's friends as

assembled to welcome his return from Greece (an imitation of the 46th Canto of the Orlando Furioso), introduces among them the two Harcourts—

“Harcourt I see, for eloquence renown’d,  
The mouth of justice, oracle of law!  
Another Simon is beside him found,  
Another Simon, like as straw to straw.”

Pope’s epitaph, inscribed upon his monument at Stanton Harcourt, is known to every reader of poetry. It received divers corrections at the hands of Lord Harcourt, who appears to have been but indifferently satisfied with it when first submitted to his criticism. For instance, the sixth line—

“Since Pope must tell what Harcourt cannot speak”—  
stood originally—

“Harcourt stands dumb, and Pope is forced to speak”—

until recast by his lordship’s desire, his ear being especially displeased with the not very euphonious participle “forced.” The “father’s sorrows” recorded in the epitaph had doubtless tolerably subsided during the two years which had elapsed since his loss, or might not unreasonably have rested some imputation upon the sincerity of a sorrow which could busy itself in the trivialities of verbal criticism over the grave of an only son.

We now arrive at the period of Lord Harcourt’s political life which most of all needs an apology, if indeed any apology could avail to excuse the prostitution of public any more than of private character and honour. Sir Robert Walpole, who, if he rated public virtue at somewhat too cheap an estimate when he affirmed that every man had his price, at least had a special faculty of discovering those who *had*, thought he perceived some symptoms which indicated that Lord Harcourt’s opposition was not so inexorable as to be proof against the persuasives he had it in his power to apply to it. He was not mistaken. On the 14th of July, 1721, his lordship, advanced to the dignity of a viscount, with a pension swelled from two to four thousand a year, transferred himself without difficulty from the opposition to the ministerial bench, and was heard in ready defence of the self-same measures which he had denounced not long before as destructive of his country’s liberties. To see political weighed in a different scale from personal in-

tegrity, even by men of the highest dignity of rank and station—to see the hand that would reject with indignant scorn the bribe of the suitor, close without difficulty upon the pension of the minister,—is a spectacle too common to excite our surprise, however deeply it may challenge our reprobation, and however degrading the estimate which its frequency has fixed upon the character of public men in this country. It would seem that Lord Harcourt's conduct was foreseen by his friends. Prior writes to Swift, in April 1721, “The bishop [Atterbury, who was also, but with less justice, suspected of a design to go over to the ministry,] cannot be lower in the opinion of most men than he is; and I wish our friend Harcourt were higher than *he* is.” His first piece of service to the court consisted in an ineffectual attempt to screen Aislabye, the corrupt abettor of the South Sea frauds, from the penalties of his delinquency. On all the questions agitated in the following session—the Navy Debt, the Spanish Treaty, the Quarantine Act, &c. &c.—he was a frequent speaker in support of the administration. The very Mutiny Act, on which three years before he had expended so much indignant patriotism, he now discovered to be necessary to the support of the government, and forgot that it was an invasion of the rights of the people. Not long afterwards came the proceedings against Atterbury, no less objectionable in their character and tendency, and even more destitute of foundation in legal proof, than those which Harcourt had himself denounced with such zeal and force in the case of Sir John Fenwick. Here, however, we find him recording his practical denial of the principles for which he then contended; and that against the intimate associate of his former life, whose bishopric had been conferred at his own solicitation, in reward of those very principles and opinions which now *he*, at least, could only accuse the bishop of having followed up more consistently and unflinchingly than himself.

From the view of his political career, thus sullied by an unworthy abandonment of principle, it is far more grateful to turn to that of his private life, passed in familiar communion with almost all the wit and genius of his time. His intimacy with Swift has been already seen; with all the other literary ornaments of that age, from whom the divisions of party did not

absolutely estrange him,—Pope, Prior, Gay, Parnell, Arbuthnot, &c. &c.—he lived on terms of no less familiar intercourse. Of these, Pope at least, and probably most of the others, owed their acquaintance with him to Swift's introduction. "Of my later friends," Pope writes to the Dean, in 1723, "the greater part are such as were yours before; Lord Oxford, Lord Harcourt and Lord Harley, may look upon me as one entailed upon them by you." At the old mansion-house of Stanton Harcourt, which had remained unoccupied by the family since Sir Philip's death in 1688, but of which a few rooms continued habitable, Pope fixed his retreat during the summers of 1718 and 1719, and translated there the latter volumes of his *Iliad*. Gay was at the same time domiciled at Lord Harcourt's neighbouring house of Cockthorpe, and they were almost the only visitors admitted to interrupt the poet in his laborious seclusion. It was here that the melancholy incident occurred of the death of two rustic lovers by lightning in the harvest field, which is described by Pope, with rather too much poetical finery, in a letter to Lady Mary Wortley Montague, and which Thomson afterwards wrought up into his ornamental episode of *Celadon and Amelia*. In the society of these distinguished friends, adorned also by the eloquent philosophy of Bolingbroke, the cheerful wit of Peterborough, the accomplished taste of Orrery, Lord Harcourt had far higher enjoyments within his reach than could reward him for a continued agitation in the strife of politics at the expense of consistency and honour, even with the additional gratifications of a pension doubled in amount, and the precedence of a viscount. That he was himself a man of polished taste and manners, and highly accomplished in general literature, although deficient probably in the more profound acquirements of scholarship and science, is discernible even in the few specimens which remain of his composition, and is abundantly confirmed by the testimony of his contemporaries.<sup>1</sup>

Although the minister had thus deemed it desirable to

<sup>1</sup> He has been himself quoted as possessed of no mean powers in poetry, on the strength of the commendatory verses bearing his name, which were prefixed to Pope's collected poems; we have little doubt, however, that the property in them belongs to his son, whom we have already seen in the character of a versifier. Lord Harcourt became possessed by bequest of Lord Chief Justice Herbert's library, said to have been a very valuable collection, particularly in law books.



silence Lord Harcourt's opposition, he was never so far valued or trusted as to be again put in possession of any office under the crown; he was re-admitted, indeed, to the council board, and on three several occasions appointed one of the Lords Justices for the administration of the government during the King's absence in his German dominions. He was the chief ostensible negotiator of Bolingbroke's recall from exile in 1725. The Duchess of Kendal, whose influence had been propitiated by a bribe of no less than £11,000, had secured the King's concurrence, and Harcourt, who had for some time maintained a confidential correspondence with the illustrious exile, was employed to move the matter in council. Walpole's urgent remonstrances were of no avail against the influence of the favourite; and that proud and restless spirit returned to exhaust itself in vain yearnings after the station and power from which it was excluded, and of which, amid the tranquil enjoyments of philosophic leisure, it affected to have abandoned the pursuit

“ To low ambition, and the pride of kings.”

The sudden death of George I. left Walpole's tenure of power for a time extremely precarious, and it seemed probable that his trusty adherent, Lord Harcourt, might again be driven into the ungenial climate of opposition. Scarcely had he time to find this apprehension groundless, and to pay his homage at the court of the new sovereign, before he was himself hurried from the scene by the same stern summons. On Sunday, the 23d of July, 1727, as he was proceeding in his coach to visit Sir Robert Walpole at Chelsea, he was seized with a paralytic fit; and although he recovered so far as to regain the power of speech, and was even considered by the physicians to be out of immediate danger, he survived only until the following Friday, when he expired at his house in Cavendish Square, in his 67th year. His remains were conveyed to the vault of his ancestors at Stanton Harcourt.

The review we have taken of Lord Harcourt's public life furnishes the best estimate of his character. Of the vague praises of contemporary pamphleteers and poets, assiduously engaged in lauding those of their own party who had any thing to bestow, little account is to be made. A shrewd and not uncandid observer of character, who could at least have no personal prejudices or resentments to gratify by misrepre-



3dly. I was of opinion *that the executing of a second will of a different purport was, by law, a revocation of the first, though the second does not now appear.*

All the authorities that had been cited from the text law and from the commentators, showed it; all the books said the first will is revoked by the completion of the second. The revocation does not depend on the keeping and preserving of the last will; the cases cited showed the same. In the case of Burt and Burt<sup>1</sup>, the deceased was declared to have died intestate, because he had made a subsequent will which had revoked the first, though it was afterwards cancelled, and did not appear.

So in the case of Whitehead and Jennings, though the deceased on his death-bed declared his disapprobation of his first will, yet these declarations could not have revoked it since the statute of frauds; the courts must have pronounced for the first will, if they had not decreed it to have been revoked by making the second will, which it was found the testator did afterwards himself burn.

4thly. I am of opinion that the deceased must have been presumed to have destroyed the latter will himself, because it had never been, so far as it appeared, out of his custody<sup>2</sup> from the time it was executed. There was no proof that Shury ever saw it—nothing to affect him but mere surmises grounded on slight circumstances; for as to the key being in the hair trunk, the evidence was as strong on one side as the other. No evidence to affect Shury's character; I could not then presume him guilty of suppressing a will; and if I could suppose him capable of doing the act, I must go further, and suppose he was bribed to do it by Mr. Helyar, who alone could receive advantage thereon; but there was not the least colour, from the evidence, to suppose him capable of doing such an action.

5thly. And which was the main question, I was of opinion that the deceased had not done any act sufficient to revive the will of 1742, his having destroyed the last and preserved the

<sup>1</sup> 1 Phill. p. 412, 429.

<sup>2</sup> Rickards v. Mumford, 2 Phill. 23; Freeman v. Gibbons, Prerog. 1793; 2 Hagg. 328, 346; Colvin v. Fraser, 2 Hagg. 266.

first will, were not acts sufficient for that purpose. There must be to revive, *a republication or some express declaration of the testator that he would have the first operate as his will*; the authority from Vinnius, Inst. lib. 2, tit. 17, s. 6, n. 3, was full to that purpose, and his opinion was founded on the Text Law, ff. de bon. poss. sec. tab. lib. 37, tit. 11, l. 11, n. 2. In the cases of Vanier and Zue and of Stacey and Dickins, the testator's intentions that the first will should operate were fully proved. And in the case of Burt and Burt, where no such intention was proved, the deceased was pronounced to die intestate.

In the case of Lewis and Bulkeley,<sup>1</sup> Deleg. 1732, Mary Williams made her will while sole, afterwards married Dennis Hampton, whom she survived, and at his death left the said will uncanceled, and very near her death declared she considered it her will; but notwithstanding a very full commission of delegates (there being five judges and eight civilians), pronounced her to have died intestate, because, as the will was destroyed by her marriage, a republication was necessary to revive it.

In the case of Whitehead and Jennings, the testator did himself destroy the last will, and he kept the first amongst papers of the greatest consequence; if he had died without declaring any thing about the first (and he did not declare his dislike of it till within five or six hours of his death), and the court had, from the circumstances of the safe custody of the first, and his own destroying the last, pronounced for the first, it is clear from the evidence, that a will would have been established which was not agreeable to the testator's mind.

<sup>1</sup> The following observations are to be found in this case in Burn's Ecclesiastical Law: "And although the will be made before marriage, and the wife survive the husband, yet it seemeth that the will shall not revive upon the husband's death. As in the case of Mrs. Lewis, some years ago, before the Delegates: Mrs. Lewis, a widow, made a will, soon after which she married again; in some time her second husband died, and she again became a widow, without any children by either husband. The will which she made in her first widowhood remained, and being found after her death, the question was whether it was a good will or not. The counsel for the will cited many authorities from the civil law, and showed that, among the Romans, if a man had made his will and was afterwards taken captive, such will revived, and became again in force by the testator's repossessing his liberty. 'But it was observed on the other hand, that marriage is a voluntary act, captivity the effect of compulsion.' " 4 Burn's E. L. 51.

The same, probably, would have been the case here, for the dislike the deceased showed to his nephew, made it very improbable he should intend to revive the will of 1742.

When a testator has done a deliberate act to destroy a will, it would be very dangerous to construe it to be revived on surmises and conjectures only.

Upon the whole, therefore, I was of opinion to pronounce against the validity of the will of 12 February, 1742, and gave sentence accordingly, but without costs.

N. B. Mr. William Helyar has appealed to the Delegates, and prayed a commission to Lords Spiritual and Temporal, but, on hearing counsel, the Lord Chancellor granted it only to judges and civilians<sup>1</sup>, because the questions in the case turned upon points of law. The cause was afterwards argued<sup>2</sup>, and Mr. Helyar renounced his appeal, and consented that the cause should be remitted back to the Prerogative Court; and, upon the remission being brought in, I decreed administration to the sister and only next of kin, on the 14th January, 1757.

Dr. Phillimore observes, "This judgment is highly creditable to the learning and judicial attainments of Sir George Lee, and the perusal of it will satisfy the reader of the erroneous impression of those persons who have maintained that the principles laid down by Lord Mansfield in the case of *Goodright* on the demise of *Glazier v. Glazier*, 4 Burr. 2512, are diametrically opposed to those on which the judgment in this case is founded. In point of fact, the circumstances of the two cases are widely different, and the judgment in each instance is a legal conclusion, deduced from the circumstances of the particular case."

Every question respecting the validity of wills, is highly interesting to the profession in general, and the importance of the point here, renders it worth while to turn aside to examine the case of *Glazier and Glazier*.<sup>3</sup> "The short of the case

<sup>1</sup> See the reasons assigned for this limitation by Lord Chancellor Hardwicke, 3 Atkyns, 798.

<sup>2</sup> This cause was compromised in the Court of Delegates, and was not, I apprehend, argued before that court on the part of Mr. William Helyar; it was set down for argument on the 13th January, 1757.

<sup>3</sup> 4 Burr. 2512.

was this : the former will (being a will of lands) was made in 1757, the second in 1763 ; the former was never cancelled, the second was cancelled by the testator himself. Both wills were in the testator's custody at the time of his death, the second cancelled, the first uncanceled."

The case of *Helyar v. Helyar*, which was not then reported, was referred to by counsel. Lord Mansfield observed,

" Here the testator has by *both* wills devised the lands in question *to the defendant*. His cancelling the second, is a declaration 'that he does not intend that to stand as his will.' Does not that speak, 'that his first will shall stand?'"

If he had intended to revoke the first will when he made the second, it must have operated as a declaration "that the defendant should not take." But that could not be his intention, because he devises to the defendant by both.

Here the intention of the testator is plain and clear. A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will : if he does not suffer it to do so, it is *not* his will. Here he had two. He has cancelled the second. It has no effect, no operation ; it is no will at all, being cancelled before his death. But the former, which was never cancelled, stands as his will.

Mr. Justice Yates' concurred with Lord Mansfield for the same reasons. A will has no operation till the death of the testator. This second will never operated : it was only intentional. The testator changed his intention and cancelled it. If by making the second the testator intended to revoke the former, yet that revocation was itself revokable, and he has revoked it.

He then referred to the Statute of Frauds, and said that none of the modes of revoking a will there mentioned, had been complied with.

We confess we cannot reconcile these two cases ; the circumstances are, it is true, different, but still the principles are completely at variance. The important point decided in *Helyar v. Helyar* was, "that the executing of a second will of a different purport was by law a revocation of the first, though the second does not now appear." It is true that, in *Glazier v. Glazier*, the second will was not of a different purport, but Lord Mansfield and his brethren contended, that

a second will cancelled, or not appearing, has *no effect, no operation; it is no will at all*. If by it the testator *intended* to revoke the first, the *revocation* was revocable; and he did revoke it. They asserted, too, that a will of lands must *remain and continue in force* unless cancelled or revoked, as mentioned in the Statute of Frauds; the cases of revocation by the alienation of the subject matter, and some other decided cases, being excepted. Now apply these principles to *Helyar v. Helyar*, and it is impossible to arrive at the same conclusion as *Sir George Lee*. If, then, the mere executing of a second will, which will that learned judge rightly presumed to have been destroyed by the testator, did not operate as a revocation of the first, the change of feeling towards his nephew or any declarations made by him could not have that effect.

*PELHAM v. NEWTON*, vol. ii. p. 46. A testatrix, by a codicil, directed her executor to deliver certain sealed-up parcels to certain persons named. The executor desired the opinion of the Court what he ought to do with respect to the parcels.

*Judgment:—Sir George Lee.*

I was of opinion he could not safely deliver them unopened, for if he should be called to an inventory, he could not give in one on oath, without knowing what was contained in those parcels; and if he assented to them as legacies, and there should not be assets sufficient to pay the debts, he would be guilty of a *devastavit*. I therefore decreed those parcels to be opened in presence of the register, to see what was contained in them; they were accordingly opened in court, and they contained bank-notes, some of £20 and some of £30 each, of which a schedule was made, of the names of the persons, and of the sum contained under each person's name, to be added as a codicil to the will, and decreed probate of the will and all the aforesaid papers to the executors.

*BARROW v. BARROW*, vol. ii. p. 385. A testator destroyed his will, but preserved a codicil. *Sir George Lee* was of opinion that the codicil was not destroyed by the burning of the will, but was a substantive instrument or testamentary schedule, and as in this case the testator intended to die testate, considered it as his will, and declared he intended his wife should have almost all, agreeably to the codicil; I pronounced for the validity of it as a testamentary disposition, and decreed

administration to the widow, with that schedule annexed, and swore her administration in court.

**COX v. RICOFT**, vol. ii. 373. In this case Sir G. Lee held that the herbage of a church or chapel-yard, and the loppings of the trees therein, belonged to the incumbent, and that he might lawfully lop them. And he said that the statute 35 Edw. I. *ne rector prosternat arbores in cœmiterio*, does not prohibit the parson from lopping trees in the church-yard, but prohibits him from cutting them down, except for the repairs of the church; and that if a parson is prosecuted upon that statute, it must be at common law by indictment.

**ARNOLD v. EARLE**, vol. ii. 529. Thomas Newbee, under the age of sixteen years, died leaving one uncle of the whole blood and two of the half-blood, having made a will by which he left all his effects to George Earle, his schoolmaster, with whom he boarded and lodged. The witnesses, two persons of unblemished character, swore that the deceased read the will twice over to them, declared his entire approbation of it, and said that it was all his own handwriting; that he had no regard for his uncles, for they had shown none to him, and that he had resolved to leave all he had to Earle, for he and his wife had been parents to him, and that he duly signed, sealed and published the will in their presence, and desired them to attest it, which they did in his presence, and that deceased was perfectly in his senses.

There was an attempt to prove fraud and imposition, but it entirely failed, but counsel contended, that from the circumstances of the case fraud must be presumed, and that the minor was not of legal age for making of a will for personal estate; for that by law he ought to be seventeen or eighteen years of age,

Judgment.—Sir George Lee.

But I was of opinion that by law a male may make his will for personal estate at fourteen,<sup>1</sup> and a female at twelve, the ages at which by law they are capable of marriage, unless it appeared they had not a capacity to understand the act they did, the contrary of which appeared in this case; and therefore the evidence in support of the will being strong and clear, I pro-

<sup>1</sup> Godolph. O. L. 22; 2 Black. Com. 497.

nounced for the validity of the will, but gave no costs, because the circumstances of the case did *primâ facie* create strong suspicions which it concerned Earle to clear up, which I thought he had done, and the uncle lived at a distance and could not himself know the facts.

Mr. Hargrave observes, "there is a great abundance of irreconcilable opinions in our books, about the earliest age at which a will may be made of personal estate."<sup>1</sup> This decision is, therefore, important, and it is in conformity with the best opinions. It is clear that the courts of law will not prohibit the ecclesiastical courts from allowing wills made under the age of twenty-one years.

W.

---

#### ART. IV.—ON COVENANTS WHICH RUN WITH THE LAND.

---

IN Spencer's case,<sup>2</sup> a leading authority on this branch of the law of covenants, many differences were taken and agreed concerning express covenants and covenants in law, and which of them run with the land, and which of them are collateral and do not go with the land, and where the assignee shall be bound without naming him, and where not; and where he shall not be bound although he be expressly named, and where not. Although the doctrines on which these differences were founded have since been much discussed in numerous cases, the practical application of them is often found to be still attended with difficulty.<sup>3</sup> We propose therefore to show that in determining whether a covenant does or does not run with the land, these three things are mainly to be considered: 1stly,

<sup>1</sup> Co. Litt. 89, b. note 6; Williams on Executors, p. 13.

<sup>2</sup> 5 Coke Rep. 16, a.

<sup>3</sup> The ambiguity of the phrase "running with the land," and the complexity of the usual mode of division adopted in the digests and text books (such as "when the heir may sue or be sued," "when the assignee may sue or be sued,") will be apparent when we consider that "the land" means sometimes the estate of a grantor, (we use the term "grant" in its more comprehensive sense of conveyance), sometimes the estate of a grantee. Whether it be meant to express that the benefit of the covenant is annexed to the estate of the covenantee, or that the liability is annexed to that of the covenantor, the phrase still is "the covenant runs with the land."



the relation subsisting between the covenanting parties; 2dly, the subject matter of the covenant; and 3dly, the employment or omission of terms legally descriptive of descendants or future owners. A great majority of the cases which have occurred have been determined with reference to the two first points alone.

1. In the first place "there must always be a privity<sup>1</sup> between the plaintiff and defendant to make the defendant liable to an action of covenant; the covenant must respect the thing granted or demised; when the thing to be done or omitted to be done concerns the land or estate, that is the medium which creates the privity between the plaintiff and defendant."<sup>2</sup> The privity here spoken of is privity of estate, as contradistinguished from privity of contract. "It is not sufficient (Lord Kenyon has said) that a covenant is concerning land, but in order to make it run with the land, there must be a privity of estate between the covenanting parties."<sup>3</sup> The same principle was declared by Lord Ellenborough in a case of covenant for rent against the assignee of a term. "This action as well as that of debt is maintainable only upon the privity of estate, and the defendant is merely charged thereby because it is a covenant which runs with the land; for if it had been a collateral covenant,<sup>4</sup> the assignee would not have been bound by it."<sup>5</sup>

<sup>1</sup> Privy or privies is where a lease is made to hold at will, for years, for life, or a feoffment in fee, and in divers other cases; now because of this that hath passed between these parties they are called privies, in respect of strangers between whom no such conveyances have been. *Termes de la Ley*, tit. Privie. And it is to be known that, as to the matter now in question, there are three manner of privities; scil. privity in respect of estate only, privity in respect of contract only, and privity in respect of estate and contract together. *Walker's case*, 3 Coke Rep. 23, a. The statute 32 Hen. 8. c. 34, (relating to remedies for and against grantees of reversions) seems to have created a fourth privity, namely, a privity of contract in respect of the estate, as between the assignees of the reversion and the lessees or their assignees. 3 T. R. 394.

<sup>2</sup> 3 Wilson, 29.

<sup>3</sup> *Webb v. Russell*, 3 T. R. 402.

<sup>4</sup> Covenants are some of them said to be *inherent*, i. e. such as are conversant about the land (and knit to the estate in the land,) and some of these are said to be *collateral*, i. e. that are conversant about some collateral thing, that doth nothing at all, or not so immediately concern the thing granted, nor are not knit to the estate, because they are entered into with a person who is stranger to the estate. *Shepherd's Touch*. Preston's edit. p. 161.

<sup>5</sup> *Stevenson v. Lambard*, 2 East, 580.

Thus where a mortgagor joined with the mortgagee in making a lease, in which the covenants for the payment of the rent and keeping the premises in repair were entered into with the mortgagor and his assigns alone, it was held that an assignee of the mortgagee's interest could not maintain an action for the breach of these covenants, which, not being made with the person who had the legal estate, did not run with the land. The mortgagor had no interest in the land of which a court of law could take notice. These therefore were collateral covenants.<sup>1</sup> Consistently with the principle of *Webb v. Russell*, it was held in another case, in which the lease had been made in like manner, but the interests of the mortgagor and mortgagee had become extinguished during the term by the reversioner's acquiring their estate, and the action was brought by the mortgagor, that the covenants must be considered covenants in gross, and that the mortgagor might of course still maintain an action upon them.<sup>2</sup>

Implied covenants run with the land. Thus it was ruled in *Spencer's case*<sup>3</sup> that where a man makes a lease for years by the word, *grant*, or *demise*, which implies a covenant, if the assignee of the lessee be evicted he shall have a writ of covenant. So if a man demises or grants land to a woman for years, and the woman marries and dies, the husband shall have an action of covenant on the covenant in law; and several other cases were put of persons (tenant by statute merchant, elegit, &c.) coming to a term by act in law and having an action of covenant as a thing annexed to the land.

But covenants cannot be implied against one having no legal interest in the subject of the grant; as a mortgagor who has joined with the mortgagee in making a lease.<sup>4</sup>

If the privity of estate which existed between the covenantor and covenantee be determined, the covenant will no longer run with the land. Thus if a subsequent purchaser do not take the estate of the original purchaser, he will not be bound by the covenant. This was determined in a very important case<sup>5</sup> which turned upon the effect of the heretofore usual

<sup>1</sup> *Webb v. Russell*, 3 T. R. 393; and see *Burton's Compend.* (581, n.)

<sup>2</sup> *Stokes v. Russell*, 3 T. R. 678, affirmed in Exch. Chamb. 1 Hen. Blac. 562.

<sup>3</sup> 5 Coke Rep. 16, a.

<sup>4</sup> *Smith v. Pocklington*, 1 Crompton & Jervis, 445.

<sup>5</sup> *Roach v. Wadham*, 6 East, 289.

mode of conveying lands by appointment under a power created in a limitation of uses in bar of dower. It was held that the second purchaser took not as assignee of the first purchaser's estate, but by way of appointment under the power; in effect as if the original conveyance had been made to himself; and consequently that he was not liable at the suit of the original vendor upon a covenant entered into by the first purchaser for himself, his heirs, and assigns, for payment of a perpetual fee-farm rent. "This decision," says Sir Edward Sugden, "leads to the observation that wherever a purchaser is to enter into a covenant which it is intended shall run with the land, the vendor ought to insist upon the purchaser taking a conveyance in fee, and should not permit the estate to be limited to the usual uses to bar dower." With respect to the general doctrine, this observation remains in force; but it may be useful to remark, in passing, with respect to the application of it to the limitation in bar of dower, that for this purpose the limitation is rendered ineffectual, and its object otherwise provided for by the recent act for the amendment of the law relating to dower.<sup>1</sup>

Where the lessor was only tenant for life, it was held that his heir was not entitled to the benefit of covenants made with the lessor; because the lease determined by his death.<sup>2</sup>

If a lessee part with his estate to a stranger, with the assent of the lessor, (which may be testified by receipt of rent from the assignee,) the privity of estate is destroyed, and the liability of the lessee under the covenants which operate by reason only of that privity, ceases.<sup>3</sup> But the obligation of an express covenant, though it runs with the estate to the lessee's assignee, and from him may be transferred with the estate to a second assignee, and so on, yet continues always in the person of the original covenantor, who cannot divest himself of his responsibility: and the same rule applies to all other ex-

<sup>1</sup> By the 3 & 4 W. 4. c. 105, s. 2, the widow is to be entitled to dower out of equitable estates of inheritance; and by sec. 4, no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

<sup>2</sup> *Brudenell v. Roberts*, 2 Wils. 143.

<sup>3</sup> *Walker's case*, 3 Co. 24, b    *Wadham v. Martin*, 8 East, 316, a.    *Auriol v. Mills*, 4 T. R. 98.

press covenants the obligation of which runs with the land.<sup>1</sup> So upon a covenant running with the land the assignee of the lessee is liable for a breach of covenant after the assignment to him, though he have not taken possession, and though assigns be not mentioned in the covenant;<sup>2</sup> but his liability ceases when he assigns his interest.<sup>3</sup> Thus in a recent case<sup>4</sup> of covenant for non-payment of rent against assignees of a lease under an assignment made in breach of a covenant in the lease not to assign without the consent of the lessor, the defendants pleaded an assignment by them before the rent became due, it was held that they were not liable. The principle of the decision was thus stated by Mr. Justice Bayley: "This action being founded on privity of estate, the obligation of the defendants to perform the covenant arose only from their filling the particular character of assignees of the estate which the lessee had under the lease. As soon, therefore, as they ceased to be assignees, their obligation to perform the covenant was at an end."

II. A covenant which runs with the land must possess certain qualities with regard to its subject-matter. It is in the determination of those qualities that the principal difficulty of the subject we are considering exists; a difficulty which seems to have arisen partly from the employment, by way of analogy, of terms properly applicable to material things, and partly from the narrowness of certain judicial resolutions in the old cases, which have greatly influenced the course of subsequent decisions. Instead of proposing a definition which might be unintelligible to those whose minds had not been directed to the subject in all its bearings, and would most probably be still inadequate, we may more effectually assist the judgment of the practitioner by affording in the first place such a general description of the requisites of this covenant as seems most consonant with the tenor of the authorities; and secondly, by a brief notice of the decisions bearing upon this subject according to that order of arrangement which seems best calculated to show their relation to each

<sup>1</sup> Cro. Jac. 522. *Edwards v. Morgan*, 3 Lev. 233. *Burton's Compend.* (1086.)

<sup>2</sup> See 2 Saund. 304, n. 12; 1 Brod. & Bing. 238; Bac. Abrid. E. 3.

<sup>3</sup> 1 B. & P. 21.

<sup>4</sup> *Paul v. Nurse*, 8 B. & C. 486.

other, and to the doctrine which they are intended to illustrate.

A covenant which runs with the land must be a covenant real;<sup>1</sup> that is to say, it must "have for its object something annexed to, or inherent in, or connected with land, or other real property." The essential distinction (says Mr. Cruise) between a real and a personal covenant is, that a real covenant runs with the land, and descends to the heir, and is also transferred to a purchaser.<sup>2</sup> It must "affect the nature, quality, or value of the thing demised (or conveyed) independently of collateral circumstances; or it must affect the mode of enjoying it."<sup>3</sup> "Where a covenant is beneficial to the owner of the estate, and to no one but the owner of the estate, it may be said to be beneficial to the estate; and so directly within the principle on which covenants are made to run with

<sup>1</sup> In a late work, (Platt on the Law of Covenants, p. 60,) it is justly observed, that it is of course a necessary ingredient in the constitution of a covenant real, that it relate to the realty; and it is immaterial whether the interest or quantity of estate to which the covenant refers be a real estate (properly so called) or a chattel interest in realty. Shortly afterwards, however, the learned author lays it down, that a covenant, though clearly personal, or relating to personalty, as to pay a gross sum of money, may be a covenant real, because the heir being named will be liable in respect of assets by descent from his ancestor, the covenantor. Thus it appears that although a covenant cannot be real unless it relate to realty, a covenant may be clearly personal, or relating to personalty, and yet be a covenant real. The author founds this somewhat paradoxical position upon a passage in Blackstone, wherein the commentator, speaking of covenants under the title, Alienation of things real by deed, mentions some of the usual covenants on the part of "the grantor" and the "grantee," in conveyances of land, adding, "If the covenantor covenants for himself and his heirs, it is then a covenant real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent, but not otherwise." By "the covenantor," it seems evident from the context, that the commentator meant "the grantor" or "grantee," in other words, that he spoke exclusively of covenants of which the subject-matter was "things real," referring to the rule that although the covenant relate to realty, and the benefit of it, go with that realty to the heirs or assigns of the covenantee, the liability of the covenantor will not in general descend to his heirs, unless named. The passage therefore does not, we conceive, justly afford the inference, that "according to Blackstone's definition, even the most personal or collateral covenant would, if the heirs were named, rank as a covenant real; nor (considering that in arranging things into species, it is as well not to confound under one name things very different) can we agree with Mr. Platt that such a definition would be most reasonable and accurate.

<sup>2</sup> See Cruise's Digest, title 32, chap. 25. sec. 22 and 26. Shep. Touch. 161.  
<sup>1</sup> Chitty on Pleading, 38.

<sup>3</sup> Per Lord Ellenborough, 10 East, 135.

the land. It must be beneficial to the owner, *as owner*, and to no other person. By the term collateral covenants, which do not pass to the assignee, are meant such as are beneficial to the lessor, without regard to his continuing the owner of the estate. This principle will reconcile all the cases.”<sup>1</sup>

We shall notice separately, as far as may be, the covenants which have been held to run with the land, and those which have been held not to do so; taking first, under the former head (as of most frequent occurrence) such as have been entered into on the part of grantees; and secondly, such as have been entered into on the part of grantors of estates. It must then suffice to give a brief reference to some doubtful or anomalous cases.

In *Spencer's case* it was ruled, that when the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is *quodam modo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words: but when the covenant extends to a thing that is not in being at the time of the demise made (as in the principal case, of a covenant by lessee to build a new wall upon some part of the land demised), it cannot be appurtenant or annexed to a thing which hath no being.<sup>2</sup> In a modern case at *Nisi Prius*<sup>3</sup> this doctrine was acted upon; but it must, we apprehend, be taken with some qualification. As nothing else can rationally be intended by the phrase “annexed to the land” than that the covenant is (as Mr. Preston more aptly expresses it) “knit to the estate in the land,” it would be absurd to shape our judgment according to the sign rather than the thing signified. In this sense an enlightened judge, in adverting to the fallacious objection, that tithes, being incorporeal, cannot endure or support a covenant to run with them, observed that we must “strip the mind of the idea of matter.”<sup>4</sup> In fact, in several cases hereafter cited will be found instances of future acts to be done upon or respecting

<sup>1</sup> Per Best, J., *Vernion v. Smith*, 5 B. & A. 10; and see *Vyvyan v. Arthur*, 1 B. & C. 417.

<sup>2</sup> 5 Co. 16 a. 1st resolution; but see *Mo.* 159, cont.

<sup>3</sup> *Guy v. Cuthbertson*, 2 Chitty, 482.

<sup>4</sup> Lord C. J. Wilmot, 3 Wils. 30.

the land, not more coming within a strict acceptation of the terms of the resolution in *Spencer's case*, than that of building a wall, or otherwise adding to the things legally appurtenant to the estate.<sup>1</sup>

In several leading cases the principle of the decision was, that the subject-matter of the covenant affected the support or preservation of the property. Thus a covenant by a lessee to repair the houses demised to him during the term, extends to the support of the thing demised, and therefore shall bind all others as a thing which is appurtenant, and go with the land in whose hands soever the term shall come.<sup>2</sup> A covenant to lay out a given sum of money in rebuilding or repairing the premises in case of damage by fire, would clearly be a covenant running with the land.<sup>3</sup> Such also is a covenant to insure (simply) against fire premises situate within the weekly bills of mortality, mentioned in 14 Geo. III. c. 78,<sup>4</sup> which statute enables any person interested in or entitled to the premises damaged, upon application to the directors of the insurance office, to have the insurance money laid out in rebuilding the premises.

Where in a lease of mines the lessee covenanted to pull down an old smelting mill, and build another of larger dimensions, and to keep such new mill in repair, and so to leave it at the end of the term, it was held that this covenant ran with the land, and consequently that the assignee of the reversion might sue upon it.<sup>5</sup> The grounds of this decision, as assigned by Lord Tenterden, were that the building which the lessees covenanted to erect and maintain, was to be built and used for mining purposes; it was to be the property of the owners of the mines, and could not be so except in that character; it related to the mines only, and if severed from its connexion with them would not belong to the owners. It could not therefore be said that these covenants concerned a thing collateral, and unconnected with the tenements demised. Upon

<sup>1</sup> See Lord Tenterden's Judgment in *Sampson v. Easterby*, 9 B. & C. 505.

<sup>2</sup> *Spencer's case*, *Dean & Chap. of Windsor's case*, 5 Co. 24 a. *Lougher v. Williams*, 2 Lev. 92. *Konan v. Kemise*, W. Jo. 245.

<sup>3</sup> Per Abbott, C. J., *Vernon v. Smith*, 5 B. & A. 5.

<sup>4</sup> *Vernon v. Smith*, *ub. sup.*

<sup>5</sup> *Sampson v. Easterby*, 9 Barn. & Cres. 505.



the same principle, where a lessee of tithes covenanted for him and his assigns that he would not let any of the farmers in the parish have any part of the tithes, it was held that this covenant ran with the land; the covenant being in effect that the lessee and his assigns should take the tithes in kind; that they might continue in the same state as when the lease thereof was made, that the manner of tithing in kind might not be obliterated. In *Tatem v. Chaplin*,<sup>1</sup> the lessee of a farm-house and lands covenanted for himself, his executors and administrators constantly to reside upon the demised premises, and in default thereof to pay so much per month as a penalty, over and above the yearly rent. In an action against the assignee for breach of this covenant, the court held that it was *quodam modo* annexed to the thing demised, according to the first and sixth resolutions of *Spencer's case*, and therefore that the assignee was bound though he was not named. In this case it will be observed, that the amount of the rent appears to have been fixed with a view to the obligation to reside upon the premises. This circumstance is not expressly referred to in the argument or the judgment (which is very briefly reported), but it tends to support the justice of the decision. The court seems to have assimilated the case to that of the covenant to repair, put in the two resolutions referred to, upon which Lord Coke observes: "reason requires that they who shall take benefit of such covenant when the lessor makes it with the lessee, should on the other side be bound by the like covenants when the lessee makes it with the lessor."

In other cases the covenant referred more particularly to the mode of enjoying the property, as affecting its quality or value.—Thus covenants to lime and dung the land during the term;<sup>2</sup> to spend all the muck thereon;<sup>3</sup> to leave fifteen acres every year for pasture, *absque cultura*,<sup>4</sup> being for the benefit of the estate, have been held to run with the land, and bind the assignee though not named. The carrying on of a particular trade on the premises may be said to affect the mode of occupation.<sup>5</sup>

<sup>1</sup> 2 Hen. Blackst. 133.

<sup>2</sup> *Sail v. Kitchingham*, 10 Mod. 158.

<sup>3</sup> *Bally v. Wells*, 3 Wils. 32. *Wilmot*, 341.

<sup>4</sup> *Cockson v. Cock*, Cro. Jac. 125.

<sup>5</sup> Per Lord Ellenborough, 10 East, 166.

In other cases the act covenanted to be done was immediately beneficial to the grantor or owner of the reversion, and admitting of being viewed as forming part of the consideration of the grant, but still having relation to the land granted to the covenantor; of this nature are covenants for payment of rent,<sup>1</sup> and to discharge the lessor of all charges ordinary and extraordinary.<sup>2</sup> In *Vyvyan v. Arthur*<sup>3</sup> the principle of the cases on covenants, to render some service immediately to the grantor, was much discussed. In this case, the lessee, after covenanting to pay certain rents and sums of money, and to do certain suits and services, covenanted to do suit to a certain mill of which the lessor was seised (but which was not parcel of the demise), by grinding there all such corn as should during the term grow upon the land demised. The action was by the devisee of the lessor against the administratrix of the lessee for breach of this covenant, and it was strongly contended, with reference to the doctrines laid down in several of the foregoing cases, that the covenant did not run with the land, for it did not affect the nature, quality, or value of the thing demised; and the act required to be done was to be done upon land of the lessor, which was no parcel of the demise:<sup>4</sup> it was held, however, that this was a covenant which ran with the land, so as to enable the assignee of the reversion to maintain the action. The service was deemed to partake of the character of rent. The obvious objection to this view of the matter, that rent goes with the reversion of the land in respect of which it is reserved, and that here the mill at which the service was to be rendered might, at any time be severed from the reversion, was over-ruled on the ground that so long as the property in the mill and the reversion of the demised premises continued to be in the same person, the suit to the mill would continue to be a suit due to the owner of the reversion of the demised premises, and

<sup>1</sup> *Stevenson v. Lambard*, 2 East, 575. *Porter v. Swetnam*, Sty. 406. *Parker v. Webb*, 3 Salk. 5.

<sup>2</sup> *Dean, &c. of Windsor's case*, 5 Co. 24, b.

<sup>3</sup> 1 Barn. & Cres. 410. S. C. 2 Dow. & Ry. 670.

<sup>4</sup> *Spencer's Case*, ub. sup. In this case it was ruled, that if the lessee covenant for himself and his assigns to build a house upon the land of the lessor which is no parcel of the demise, or to pay a collateral sum to the lessor or to a stranger, it shall not bind the assignee, because it is merely collateral.

would therefore, in that respect, be in the nature of a rent. What the case would be if the ownership of the land demised and the mill had been severed, it was not necessary to decide.<sup>1</sup> If the court in this case was right in founding its judgment "entirely on the unity of title to the reversion of the land demised and to the mill," there cannot, we presume, be much room for argument upon the opposite case; and at all events, a covenant to render service to a stranger—one between whom and the covenantor there would be no semblance of privity, could not, we conceive, be deemed other than a collateral covenant. The act covenanted to be done in relation to the estate, must not only be beneficial to the owner, but beneficial to him *as owner of that estate*, and no other. There is a circumstance in this case which, though not adverted to in the arguments, is not immaterial when viewed with reference to the cases respecting the mode of enjoying the land, on the part of the covenantor. The corn to be ground was to be the produce of the land demised. In this respect, the case is distinguishable from that of *Lord Uxbridge v. Staveland*,<sup>2</sup> in which the covenant was, that the lessee, his executors, administrators, and assigns would grind *all the corn* grain or malt they should have occasion to use or spend, at the plaintiff's mill, according to the custom. It was held that this was a collateral covenant. To whatever distance the defendants removed to live; they must bring the corn to the plaintiff's mill. So that this was not to do any thing relative to the premises leased. Had it been to grind all the corn, &c. they should spend ground, it might relate to the premises, and running with the land bind the assignee. To this head may be referred covenants to let the lessor have a thing out of the demised premises, as a way, common, or other profit *appendre*, for there the covenant goes with the tenement and binds the assignee.<sup>3</sup>

Continuing the consideration of the subject-matter of covenants, we now proceed to notice the cases of covenants by grantors of estates. The most important class of covenants coming under this head is that of covenants for title. These

<sup>1</sup> Per Bayley, J. S. C.

<sup>2</sup> 1 Ves. Sen. 56.

<sup>3</sup> Cole's case, 1 Salk. 196. 12 Mod. 24. Carth. 232. 1 Show. 888.

are real covenants, and pass to the assignees of the land by the common law, who may maintain actions upon them against the vendor and his real and personal representatives.<sup>1</sup> An assignee is entitled to the benefit of the covenants, although the covenants were entered into with the original grantee and his heirs only.<sup>2</sup> As regards the right of the assignee, it is not material whether he be assignee of an estate of inheritance<sup>3</sup> or of an estate for years.<sup>4</sup> In either case there is privity of estate.<sup>5</sup> So covenant will lie by the devisee of lands in fee, though the covenant be broken in the testator's life-time.<sup>6</sup>

We need only refer the reader to the cases on covenants, that the covenantor is well seised and hath good right to convey;<sup>7</sup> for quiet enjoyment, expressed<sup>8</sup> or implied;<sup>9</sup> for further assurance;<sup>10</sup> and for renewal.<sup>11</sup>

The state of the law with respect to covenants for production of title deeds is not satisfactory, and requires separate notice. It is stated, in a recent publication of great utility, that "such a covenant, for the most part, will run with the land, i. e. the obligation of it on the one side, and the benefit (to be enforced by action) on the other, will attach upon all future owners of the same property."<sup>12</sup> And in other part of the same work the learned author observes, with regard to the usual covenants for title, that "the remedy is only against the covenantor and his heirs, executors, or administrators personally, and must fail of effect when his property is dissipated. But if the covenants constitute an arrangement of rights between

<sup>1</sup> *Middlemore v. Goodale*, Cro. Car. 503. Sir W. Jones, 406. See Sugden on Vendors, &c. Chap. 13, Sec. 1.

<sup>2</sup> Co. Lit. 385, a. *Spencer's case*, ub. sup.

<sup>3</sup> *Middlemore v. Goodale*.

<sup>4</sup> *Noke v. Awder*, Cro. Eliz. 373, 476.

<sup>5</sup> See *Campbell v. Lewis*, 3 Barn. & Ald. 392. 8 Taunt. 715.

<sup>6</sup> *Kingdon v. Nottle*, 4 Mau. & Selw. 53.

<sup>7</sup> Id.

<sup>8</sup> *Noke v. Awder*, *Campbell v. Lewis*, sup.

<sup>9</sup> *Spencer's case*, 4th resolution.

<sup>10</sup> *Middlemore v. Goodale*, sup. *King v. Jones*, 5 Taunt. 418. S. C. 1 Marsh, 107. 4 Mau. & Selw. 188.

<sup>11</sup> *Roe d. Bamford v. Hayley*, 19 East, 469. *Vernon v. Smith*, 5 B. & A. 11. *Isteed v. Stoneley*, 1 Ander. 82; and 3 Wils. 29.

<sup>12</sup> *Burton's Compendium*, 475.

the proprietors of different tenements, and thus relate also to lands of the *covenantor*, the *obligation* of them may then also be made to run with those lands, and thus the benefit becomes perpetual. Of such a nature are the covenants for the production of title deeds already mentioned: nor does there appear to be any difference in principle,<sup>1</sup> whether the vendor retains the deeds and enters into a covenant with the purchaser, or the latter takes them, and covenants with the vendor, or with another purchaser, for their production; nor whether the covenants are entered into at the time of the conveyance or afterwards." The diversities of fact here pointed at should be kept distinctly in mind. It does not admit of doubt, that where the vendor covenants with the purchaser for the production of title deeds, relating as well to lands retained by the vendor as to those sold to the purchaser, all future owners of the purchased land will be entitled to the benefit of this covenant, and, as Mr. Burton observes, there can be little doubt also that the assignee of any *part* of the covenantee's lands to which the covenant relates, is entitled to his share of its benefits. These cases however may and constantly do occur. The vendor subsequently sells the other lands to which the deeds relate, and parts with the deeds to the purchaser of these lands. Upon this the question may arise, whether the first purchaser can enforce the production of the deeds by action at law against the second purchaser, (the equitable points of notice and specific performance which have been mixed up with these [questions may for the present be kept apart,) for a breach of the covenant—in other words, whether the obligation attached, to keep to Mr. Burton's mode of expression, upon the future owner of the vendor's land. Mr. Burton says, "it seems equally clear that the obligation attaches to every part of the covenantor's lands, though afterwards severed from the rest, as far as such part is concerned in the engagement." We will now suppose that upon the first purchase the deeds were delivered to the purchaser, and that he entered into the covenant with the vendor. The purchaser subsequently sells, and delivers the deeds to his assignee: does the liability pass with the land, so as to enable

<sup>1</sup> Burton's Compendium, 582. The marginal reference is "Sugden, Vend. 542. *Barclay v. Raine*, 1 S. & S. 452, *contr. sed qu.*"

the original vendor to sue the purchaser's assignee? Assuming the affirmative, we will suppose that the vendor sells the other lands to which the title deeds relate; then can the purchaser of these other lands enforce the covenant against the first purchaser, or (after the sale by him,) against the first purchaser's assignee?

In *Barclay v. Raine*,<sup>1</sup> upon a sale of lands, the title-deeds relating to those lands and also to other lands of the vendor were delivered to the purchaser, one Thring, who covenanted for the production of them to the vendors, their heirs, executors, administrators, and assigns. Thring sold the lands so purchased by him to Slade, and at the time of the suit held the deeds as mortgagee from Slade. The other lands to which the deeds related were sold to Barclay, under whom the plaintiff claimed. The suit was for a specific performance of an agreement for the purchase of these other lands; the defendant, as it seems, objecting to complete on the ground that he was not to have the title-deeds or any remedy for the production of them. The Vice-Chancellor (Sir John Leach), in refusing a motion for payment of the purchase-money into court, said, "a court of equity never compels a purchaser to take without the title-deeds unless he has a covenant to produce them: and a right in equity to compel the production of the deeds, even if it existed, would be no answer. But the equity of the purchaser in the present case would be highly questionable. Thring's covenant to produce does not run with the land." It is to be regretted that the important legal question involved in this case had not arisen under circumstances allowing of more deliberate consideration. So far as the decision goes it bears strongly upon the questions we have suggested, and is opposed to several of the propositions of Mr. Burton, who appears, indeed, to have doubted the soundness of the decision. In the *Book of Vendors and Purchasers* (which, excellent in many respects, is singularly defective in all that relates to covenants for the production of title-deeds and to other covenants running with the land,) this case is merely referred to as an authority for the common place proposition that "a purchaser is entitled to the title-deeds or a valid

<sup>1</sup> 1 Simon & Stuart, 452.

covenant to produce them.”<sup>1</sup> In another work<sup>2</sup> the law is stated, on the authority of *Barclay v. Raine*, to be that “covenants for production run with the land for the benefit of purchasers, but not for the benefit of vendors; in other words, purchasers from the covenantee may take advantage of them against the covenantors themselves, but the liability will not extend to the covenantors’ assignees.” It may be proper to observe that the rule here propounded, whatever it may mean as applied to the case of several purchasers holding under one title, is to be found not in the judgment but in the argument of Sir Edward Sugden, in the case referred to, and in the marginal note of the reporter; and that Mr. Platt’s explanation of it is by no means borne out by the case. It was *not* decided in *Barclay v. Raine* that a purchaser from the covenantee (the original vendor) might take advantage of the covenant against the covenantor himself—Thring, the first purchaser. In concluding this part of our subject we may observe, that Mr. Burton seems, from his references, to have considered the cases on the remedies of reversioners against assignees of part of lands to which real covenants relate, to be analogous to those of the production of title-deeds of lands held by several owners under one title. We conceive, however, that there is a material difference between them with regard to the doctrine of privity of estate; and that the rule may be stated to be that the benefit of covenant for production of the title-deeds will run with the land of the covenantee so long as a privity of estate subsists between the owners of the several estates to which the deeds relate, but no longer.<sup>3</sup>

Grantors of estates sometimes enter into covenants relating to the mode of enjoyment of the land granted. Thus if a man grants to lessee for years, that he shall have so many estovers as will serve to repair his house, or as he shall burn in his house, or the like, during the term, it is as appurtenant to the

<sup>1</sup> Sugden’s *Vendors, &c.* 469, 8th edition.

<sup>2</sup> Platt on *Covenants*, 227.

<sup>3</sup> See the observations of Sir Edward Sugden on the consequences of this doctrine as applied to covenants for title entered into by vendors having equitable estates only. *Vendors, &c.* chap. 13, sec. 1.



land and shall go with it as a thing appurtenant, into whose hands soever it shall come.<sup>1</sup>

So in a modern case<sup>2</sup> where the lessor covenanted to supply the messuages demised with a sufficient quantity of good water at a certain rate for each house, it was held that being a covenant which respected the premises demised, and the manner of enjoyment, it was a covenant which ran with the land, and that the assignee of the lessee might sue the reversioner for the breach of it.

We must defer to a future occasion a notice of those cases on covenants concerning lands, which have been held not to run with the land, and of several legislative provisions bearing upon this subject, but requiring separate consideration.

L.

---

ART. V.—THE ACT FOR THE LIMITATION OF ACTIONS AND SUITS  
RELATING TO REAL PROPERTY.

[3 & 4 Wm. IV. c. 27.—Royal Assent, 24th July 1833.]

---

THIS is one of the acts passed during the last session, founded on the First Report of the commissioners appointed to inquire into the laws relating to Real Property. The principle that the long continued possession of property should confer a sure title thereto, has ever been established and maintained in this kingdom, though the rules and ordinances enforcing it have been various, ill-defined, and unsatisfactory. The statutes and dicta of judges on this subject may indeed be styled *indigesta moles*, and are sufficient to exercise the most unwearied industry; and what is worse, when investigated they afford no grounds and principles we can now approve; their periods of limitation depend rather upon the mode of assurance used by the adverse holder than upon the length of his possession, which, as soon as assurances lost their notoriety, was most unreasonable. It was unjust that any man should be

<sup>1</sup> Spencer's case, 5th resolution.

<sup>2</sup> Jourdain v. Wilson, 4 B. & A. 266; and see Holmes v. Buckley, 1 Eq. Ab. 27.

deprived of a right by a fine and non-claim for five years ; by a descent cast, discontinuance, or warranty. A past statute of limitations works no wrong, and violates no well-grounded right, though the commissioners in their observations seem to allow that such an objection may be sustained.<sup>1</sup> Such a statute does not ordain that “ the long-suffering of injury ” shall be a bar to the obtaining of right ; it only enacts that an acquiescence in the title of another till after all evidence of the commencement of such title is probably lost or impaired, and till such title, however acquired, has become the subject matter and substratum of new rights, shall be deemed an absolute cession and abandonment of the property. The object, then, of the act before us is, to use the words of the commissioners, to render the law on this subject simple and consistent, “ by giving a uniform and certain effect to adverse enjoyment,—by giving all persons alleging that they are unjustly deprived of their estates the same time for enforcing their claims, with a certain indulgence to claimants under disabilities ; and by giving one remedy at law with regard to lands, instead of the existing variety of remedies to which the different periods of limitation are attached.”<sup>2</sup>

This act does not extend to all species of property. Under the expression “ land ” it comprises manors, messuages, and all other corporeal hereditaments whatsoever, and also tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole,) [and also any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest,<sup>3</sup> ] whether freehold or copyhold, or held according to any other tenure. Under the expression “ rent ” it comprises all heriots, services, and suits, for which a distress may be made, and all annuities and periodical sums of money charged upon or payable out of any land<sup>4</sup> (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole.) It also extends to advowsons, money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, legacies, and the interest of money so secured, and

<sup>1</sup> First Report, 39.

<sup>2</sup> First Report, 40.

<sup>3</sup> We think the words we have included in brackets should have been omitted.

<sup>4</sup> This does not include rent reserved upon common leases.

of legacies, arrears of dower, and arrears of rent. Ss. 1, 30, 40, 41, 42.

The act extends to *all* persons, whether individuals, classes of creditors, or bodies corporate. S. 1.

The leading period of limitation adopted by the act is twenty years; and the general rule established is, that after the 31st December next an entry or distress shall not be made, nor an action brought; nor a suit in equity commenced, unless within twenty years after the right of the claimant to come into court first accrued. Ss. 2, 24, and 40. And all real and mixed actions, except for dower, quare impedit, and ejectment, are abolished after the 31st December 1834, s. 36: but any person who shall not then have a right of entry may bring a real action (as a formedon) until the first June 1835, in case the same might have been brought had this act not been passed, s. 37: and any person, whose right of entry shall have been taken away by any descent cast, discontinuance, or warranty, may, if otherwise entitled so to do, bring a real action even after the 1st June 1835, but only within the period during which, by virtue of the provisions of this act, an entry might have been made, had not the right been so taken away. S. 38. But a descent cast, discontinuance, or warranty, shall not take away a right of entry after the 31st December next, s. 39; so that section 38 cannot continue real actions for more than twenty years from that time. Suppose that a right first accrued to a person in October 1833, and that his right of entry were taken away in the November following, he may bring a real action at any time within twenty years after the time when his right first accrued.

Again, if the possession of any land or rent was not deemed adverse at the time of the passing of the act, the same may be recovered at any time within five years next thereafter, though twenty years may have elapsed since the right of the claimant first accrued, according to the provisions of this act. S. 15.

If, when a right first accrues, the person entitled thereto is under some of the disabilities next mentioned, that is to say, infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then, notwithstanding the above mentioned period of twenty years shall have elapsed, ten years shall be allowed next after the time when the disability of

such person shall cease, or he shall die, which shall first happen. S. 16. But though there may be a succession of persons under disability, no further time shall be allowed beyond such period of ten years or twenty years. S. 18. And after the expiration of forty years from the right first accruing, no further time shall be allowed by reason of any such disability. S. 17. No part of the United Kingdom, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any Island adjacent thereto, shall be deemed "beyond seas." S. 19.

Further, lands or rents may be recovered by ecclesiastical or eleemosynary corporations sole, within two incumbencies and six years, or sixty years, from the right first accruing. S. 29.

Advowsons shall not be recovered after three incumbencies (adverse to the title under which the claim is made, and comprising a period less than 100 years) or sixty years; and if three such incumbencies shall endure more than 100 years, then not after 100 years. Ss. 30 and 33. A presentation on a lapse to the crown or the ordinary shall be deemed adverse, but a presentation on a clerk being made a bishop shall be deemed a continuance of the former incumbency. S. 31. And a person claiming an advowson by reason of an estate which might have been barred by a tenant in tail, shall be deemed to claim under the tenant in tail. S. 32.

After the determination of the period of limitation a right shall be deemed to be extinguished. S. 34.

Arrears of dower, or damages in respect thereof, shall not be recovered for a longer period than six years next before the commencement of the action or suit. S. 41.

Arrears of rent, and interest of money secured on land and of legacies, or damages in respect thereof, shall not be recovered but within six years next after the same shall have become due; but when any prior mortgagee or other incumbrancer shall have been in possession within one year next before an action or suit shall be commenced by any person entitled to a subsequent incumbrance, such person may recover arrears of interest which shall have become due during the whole time that such prior incumbrancer was in possession. S. 42.

We beg to warn our readers that the arrears of rent just mentioned do not include rent due on common leases, which is

provided for by the Law Amendment Act (3 & 4 W. 4, c. 42, passed 14th August last) s. 3, which enacts that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance, shall be brought within ten years after the end of the then session of parliament, or within twenty years after the cause of such action accruing, but not after.

The burden of the act is to determine the time at which a right shall be said to have first accrued; and we shall now endeavour to reduce the numerous provisions on this subject to the simplest order of which they are susceptible.

We may first notice that, by s. 35, the receipt of rent payable by any lessee shall, as against any such lessee or any person claiming under him, be deemed (but subject to the lease) to be the receipt of the profits of the land. Again, a title or right may be preserved by an acknowledgment in writing given by the apparently adverse holder, but the period of limitation shall begin from the date of such acknowledgment or the last of them, if more than one be given; ss. 14, 28, 40, and 42. But a mere entry upon land shall not be deemed equivalent to the possession, s. 10; nor shall a right of entry be preserved by a continual or other claim, s. 11. And the possession of the entirety by one tenant of an undivided estate shall not be deemed the possession of his co-tenants, s. 12; and the possession of a younger brother or other relation shall not be accounted the possession of the heir. S. 13.

If a person in possession be dispossessed or discontinues the possession, the right first accrues at the time of such dispossession or discontinuance of possession. S. 3.

So if a person claims the estate or interest of a deceased person who was in possession thereof at his death, and was the last person in possession entitled thereto, the right first accrued at the death. Ss. 3 and 6.

When the right claimed arises from an instrument (other than a will) made by a person in possession, and no person has been in possession under such instrument, then such instrument determines the time when the right accrues. S. 3.

With respect to reversions, the general rule is, that the right

first accrues to the owner when his estate becomes one in possession, Ss. 3, 4, and 5.

If the prior estate be a tenancy at will without any rent being paid, the right first accrues either at the determination of such tenancy, or at the expiration of one year next after the commencement thereof; but no mortgagor or cestui que trust shall be deemed a tenant at will. Ss. 7 and 35.

If the prior estate be a tenancy from year to year, or other period, without any lease in writing, the right first accrues at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received, which shall last happen. S. 8.

If rent amounting to 20s. or upwards, be reserved by a lease in writing, and the reversioner does not receive it, and suffers it to be received by a person wrongfully claiming the same, the right first accrues to such reversioner when the rent was first so received. S. 9.

In order to recover by reason of any forfeiture or breach of condition, the right first accrues when such forfeiture was incurred or condition broken. S. 3.

But if the owner of a reversion, or any other future estate, or any person through whom he claims, shall have been entitled at the same time to the possession by reason of a prior estate, and he shall have been barred from recovering in respect of such prior estate, he shall not recover in respect of his reversion or other future estate, when it comes into possession, unless in the meantime the land shall have been recovered by the owner of some estate intervening between such prior estate and such reversion. S. 20.

An estate tail, and all estates and rights which may be barred by the owner thereof, are considered as one estate, and are comprised in one period of limitation, so that if a right first accrues to a tenant in tail, and the land is not recovered within twenty years, he and all the owners of the estates and rights he might have barred, are precluded from recovering the same. Ss. 21 and 22. Again, if an assurance is made by a tenant in tail which does not operate to bar the remainders over, but possession is had under such assurance, or by

a person not claiming in respect of an estate expectant upon the estate tail, for a period of twenty years from the time at which, if such assurance had then been executed by the tenant in tail, or the person entitled to his estate, if such assurance had not been made, would have barred the remainders; such assurance shall be deemed effectual against the remainder man. Ss. 23, 24.

The right first accrues to a cestui que trust, who claims under an express trust, at and not before the trust property shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him. S. 25.

The right first accrues to a person deprived of property by fraud at and not before the time at which such fraud shall, or with reasonable diligence might, have been known or discovered. But property shall not be recovered on account of fraud from a bonâ fide purchaser for valuable consideration who has not assisted in such fraud, and had not notice thereof. S. 26. And Courts of Equity may refuse relief, on the ground of acquiescence, to any person whose right may not be barred by virtue of this Act. S. 27.

The right first accrues to a mortgagor out of possession at the time when his mortgagee first obtained possession. S. 28.

With respect to money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, and legacies, the period of limitation is twenty years, which begins to run when a present right to receive the same shall have accrued to some person capable of giving a good discharge; but in case of the payment in the meantime of part of the principal or interest, or an acknowledgment in writing, the time runs only from such payment or acknowledgment. S. 40.

The Act extends to suits in the Ecclesiastical Courts; s. 43. But it does not extend to Scotland; nor so far as it relates to advowsons to Ireland. S. 44.

To this review of the very important Act before us, we will subjoin some of the observations made by the Commissioners when recommending the adoption of its provisions:—

“The establishment of this period of limitation; and the



abolition of real actions, would tend greatly to diminish litigation, and would save the owners of real property from much vexation and expense to which they are at present exposed, sometimes in defending their possession, and still more frequently when they attempt alienation. By the proposed alteration, the practical efficient remedy for recovering possession would not be impaired. When the ancient remedies were framed, descent was the chief mode of transmitting real property, and devises, terms of years, and the distinction between legal and equitable estates, were nearly unknown. The actions which may now be brought after an adverse possession of twenty years, are almost exclusively applicable to the case of an heir claiming a legal estate by descent, and they require that he should allege and prove a seisin in his ancestor. If a chattel interest in land be claimed, if the claim be under a will or conveyance or entail, an adverse possession of twenty years is an absolute bar. In Courts of Equity the rule is generally understood to be established, that after an adverse possession of twenty years, no relief can be given; and when it is considered how generally the existence of mortgages, trusts, and outstanding terms prevents any legal remedy, it will be found that this rule is applicable to a very large proportion of the land in England. So far the proposal is no innovation; and surely there ought not to be a longer limitation for legal than for equitable estates, both being alike capable of adverse possession, and the claimant having at least as good an opportunity of asserting his right, if the legal estate be in himself, as if it has been vested in a trustee."

"Although a claim can seldom be set up after twenty years adverse possession, the instances, however rare, in which this occurs, render all titles questionable to the extreme limit ever allowed; and upon the sale and mortgage of land, it is necessary that every title should be strictly examined for nearly a century, and that evidence should be given of the enjoyment, transfer, and devolution of the property during that period.<sup>1</sup>

"This is the main cause of the length of abstracts necessary to be laid before conveyancers, and of the harassing and

<sup>1</sup> This is an extravagant assertion; at least the fact is, that a very large proportion of sales and mortgages have been completed upon an unsuspecting title being shown for about forty years.

expensive inquiries to which they give rise. Many titles, notwithstanding long enjoyment, are found unmarketable; and if after tedious delays, the transaction is completed, the law expenses inevitably incurred sometimes amount to no inconsiderable proportion of the value of the property. From the increased frequency with which real property changes hands in modern times, the length of abstracts is a growing evil, and calls loudly for remedy; and we think some diminution of the evil will be produced by shortening and making uniform the period of limitation; although to guard against the fabrication of fee simple titles by persons in possession under particular estates, it will be requisite to investigate titles for a greater number of years than the period of limitation which may be prescribed.”<sup>1</sup>

Mr. Preston has recorded a case which shows strongly the advantage which will accrue to some titles from the foregoing Act. “In Mr. Yieldham’s case there were no title deeds whatever, but the title depended on successive descents, and an objection was taken to the title on this ground. The late Lord Redesdale (then Sir John Mitford,) was of opinion that the want of deeds did not raise any objection to the title; but the conveyancers who were consulted, would not be satisfied with the title as strictly marketable, and they considered that the seller ought to make an abatement of one third of the purchase money on account of the risk to which the title was exposed, and the difficulty which would attend the same when carried to market; and such abatement was made accordingly.”

“In this instance various precautions were taken to guard against the possibility of latent intails and other incumbrances. As well as I remember, a common recovery was suffered by the present owner to bar his estate tail, if any, and all remainders, expectant on the same, a feoffment was made by him and his brothers and sisters, and a fine levied for the purpose of the establishing of the title through the medium of the statutes of non claim on fines. And the deeds stated the reason of the several assurances, averring that there were not any settlements or wills in the knowledge of any of the parties; there was also a separate conveyance by lease and re-lease,

<sup>1</sup> 1st Report, p. 40.

from the seller to the purchaser, with covenants for the title generally, as against all persons."

The following facts, which were lately met with in an abstract, show clearly the advantage which will result from the enactment we have analysed; they involve, too, the estate of coparceners in tail, "the rarest kind of inheritance that is in the law," upon which we will make a few observations.

Land was conveyed to William in tail general, remainder to Thomas in tail general, remainder to Elizabeth in tail general, remainder to the right heirs of the settlor, (the father of William, Thomas, and Elizabeth).

William died seised of the estate tail, leaving only four daughters, Jane, Margaret, Emma, and Fanny. These four daughters were of course coparceners in tail; but William, treating the land as his own fee simple, devised it to Margaret, Emma, and Fanny, as tenants in common in fee, bequeathing a money legacy to Jane. The consequence was, that Margaret, Emma, and Fanny entered into possession of the entirety of the land, and retained it without opposition from Jane. This occurred above a century ago, and the land is now held under a title from the three devisees; and Jane and her issue, if she had any, are barred by length of time; for the act of the devisees amounted to an *ouster*, and so created an adverse possession.<sup>1</sup> But inasmuch as no recovery was suffered by Jane or her issue, as to her one-fourth of the estate, the title, were it not for the recent Act, would have remained unmarketable, and indeed unsafe, until a sufficient period had elapsed after the failure of all the issue of William. And it should be stated that the present possessors of the property cannot, after a diligent inquiry, ascertain whether there be any issue of William in existence or not. Such is the predicament in which many titles have been placed.

It is said in our text books that there is no survivorship among coparceners; but this is not strictly true; for although as *between themselves* they have several freeholds, which descend to their respective issue, yet with respect to strangers and persons in remainder, they seem to be joint-tenants. "As they be but *one heir*, and yet several persons, so have

<sup>1</sup> Davenport v. Tyrrell, 1 W. Bl. 675. 2 Cru. Dig. 464. Doe v. Prosser, Cowp. 217. Peaceable v. Read, 1 East, 568. See 3 Barn. & Adol. 761.

they *one* entire freehold in the land, in respect of any stranger's *præcipe*."<sup>1</sup> So, we apprehend, if one of several coparceners in tail dies without issue, the survivors or their respective issue take her share by survivorship, and their respective shares of the estate tail are *pro tanto* increased. Sir Edward Coke writes, "if two coparceners be, and each of them taketh husband and hath issue, the wives die, the coparcenary is divided, and here is a partition in law."<sup>2</sup> This seems contrary to what we find in a preceding page of the same author. He says, "coparcenrie is not severed or divided by law by the death of any of them." Again, "if two coparceners are disseised and die, after their deaths their respective issue shall not join in assise; because several rights descended to them from several ancestors; and yet when they have severally recovered, they are coparceners, and one *præcipe* lieth against them, and a release made by one of them to the other is good."<sup>3</sup> We presume the way to reconcile the passages is this: that in the former, Sir Edward Coke merely means to say that the *husbands* who would be entitled as tenants by the curtesy, would not be coparceners.

W.

---

ART. VI.—THE LAW OF DUELLING.

---

ALTHOUGH duelling has ever been a cherished topic with juvenile debating clubs and philosophers in embryo, on which to practise their unripened wits, it may seem at first, however suitable to them, to hold out few attractions for the inquiry of the legal student. But a recent event having drawn some public attention that way, we are unwilling to let slip so favourable an occasion for examining what the *law*, and also the *practice*, for these have rarely coincided, respecting the offence appear to be. The reader need not fear that the thousand times *vexata questio* is about to undergo a new solution; the perplexing problem whether it be more expedient to allow bad hearted and bad tempered men to insult, or injure by word or deed, their betters with physical impunity,

<sup>1</sup> Co. Litt. 164, a; 3 Prest. Conveyancing, 95.

<sup>2</sup> Co. Litt. 167, b.

<sup>3</sup> Co. Litt. 164, a.

at least within certain limits, or to put some doubtful check upon these gentry, by shooting or stabbing a very small percentage of them annually, and a rather larger one of those whom they assail. Our province is merely to examine in what light the law of England regards duelling, how that law deals with it theoretically, how that law has dealt with it practically, and what are the punishments ordained or to be ordained for the purpose of preventing it, if it is to be prevented at all.

We have not to look deep, if we have to look far, for the origin of the custom. The distinction of barbarous and war-like tribes, the privilege of equal and independent freemen, the natural product of feudal institutions, the favoured nursling of that fantastic and gorgeous chimera, chivalry, the amusement of a people without fear, and the resource of a people without law, trial by battle very early took a prominent position among the customs of northern Europe. Introduced into this country by the Norman conquerors, it superseded the milder practice of the ordeal, which the superstitious piety of our Saxon ancestors had established and made popular, to replace it by the not less superstitious appeal to the arbitrament of the spear and sword. The scorching ploughshare or the deep river might seem methods of investigation more directly calling for the active interference of the Deity to punish the guilty and protect the innocent; but he was not less firmly believed to be invisibly present in the lists, and ready, should justice be with the weaker party, to turn aside his adversary's weapon, and insure to him the otherwise impossible victory. With this faith in the efficacy of single combat to decide all doubtful questions of right, it is not surprising that a people to whose tastes and feelings it was so consonant, should employ it very commonly, and conduct all its details with the most signal pomp and solemnity. True, as time rolled on, as faith grew weaker, and law stronger, the appeal to the tribunal of arms was gradually and reluctantly abandoned, and men came to put more trust in the decisions of their fellows than in the inscrutable judgments of a divine arbiter. The last trial by battle, in vindication of a civil right, took place in the Court of Common Pleas in 1571; the last proceeding of the same nature on a criminal charge, occurred about sixty years afterwards in the Court of Chivalry, on an appeal of High Treason

by Donald, Lord Rea, against David Ramsay, Esq., and there the combat was ultimately prevented. A full account of the transaction may be found in the State Trials,<sup>1</sup> and appended to it a collection from Dyer, Minsheu, and Barrington,<sup>2</sup> of remarkable accounts of Trials by Battle, which are worth the perusal of those who desire to see with what solemn magnificence, and sincere reliance on their validity, these extraordinary conflicts were conducted. But though judicial combats ceased, duels grew only more abundant; this mode of punishing grave injuries became a remedy for the most trifling affronts, and as it declined in favour with the laws of England, it acquired additional sanctity and importance with the laws of honour. The President Montesquieu has so ably and ingeniously derived the system of private duelling from that of trial by battle, that we cannot resist the temptation of quoting his observations: <sup>3</sup>

“ Déjà je vois naître et se former les articles particuliers de notre point d'honneur. L'accusateur commençoit par déclarer devant le juge, qu'un tel avoit commis une telle action, et celui-ci repondoit qu'il en avoit menti, sur cela le juge ordonnoit le duel. La Maxime s'établit, que lorsqu'on avoit reçu un dementi, il falloit se battre.

“ Quand un homme avoit déclaré, qu'il combattoit, il ne pouvoit plus s'en departir, et s'il le faisoit, il étoit condamné à une peine. De-là suivit cette regle, que quand un homme s'étoit engagé par sa parole, l'honneur ne lui permettoit plus de la retracter.

“ Les gentilhommes se battoient entre eux à cheval et avec leurs armes; et les villains se battoient à pied et avec le bâton. De-la il suivit que le bâton étoit l'instrument des outrages, parce qu'un homme qui en avoit été battu, avoit été traité comme un villain.

<sup>1</sup> Howell's Edit. v. 3, p. 485.

<sup>2</sup> He mentions among other curious particulars, the origin of that scene in the second part of Henry the Sixth, where Shakspeare seems so clearly to have intended to ridicule the practice of judicial combats. It is a story of a citizen of London of strong make but faint heart, who, entering the lists against an antagonist both weak and puny, was made drunk by his friends with the design of raising his courage, and so fell an easy prey to his adversary. Horner and his man Peter owe their origin evidently to this tale.

<sup>3</sup> Esprit des lois, b. 28, c. 20.

“ Il n’y avoit que les villains qui combattissent a visage découvert; ainsi il n’y avoit qu’ eux qui pussent recevoir des coups sur la face. Un soufflet devint une injure qui devoit être lavée par le sang, parce qu’ un homme qui l’avoit reçu avoit été traité comme un villain.”

It is remarkable that the first decided hostility to the practice of duelling, which our courts of justice appear to have evinced, was manifested at the instigation of one more famous for having stemmed the tide of popular opinion and combated antiquated prejudices in a far other and grander arena. It is remarkable, also, that it was before the most aristocratic and unjust of tribunals that he made his proposition for checking this pernicious custom. In the year 1615, Sir Francis Bacon, then Attorney-General, exhibited an information before the Star Chamber against William Priest, for writing, and Richard Wright for carrying, a challenge to fight.<sup>1</sup> “ My lords,” said he, “ I thought it fit for my place, and for these times, to bring to hearing before your lordships some cause touching private duels, to see if this court can do any good to tame and reclaim that evil, which seems unbridled.” After expressing his wish to have selected persons of more rank, he adds, “ but it passeth not amiss sometimes in government that the greater sort be admonished by an example made in the meaner, and the dog to be beaten before the lion. Nay, I should think, my lords, that men of birth and quality will leave the practice when it begins to be villified and come so low as to barber-surgeons and butchers, and such base mechanical persons.” With this exordium, not ill-calculated to conciliate and gratify his hearers, he proceeds to enter on the question in that wise and philosophic spirit that characterises his mighty mind. He explains the objects which he desires to discuss, to be—first the nature and greatness of the mischief:—secondly, its causes and its remedies;—thirdly, the justice of the law of England which some stick not to think defective in this matter;—fourthly, the capacity of that court to entertain the question;—fifthly, his purpose in the prosecution.

In discussing the first of these topics, he is scarcely candid enough in admitting how entirely the law itself, by giving its

<sup>1</sup> See Sta. Tr. v. 2. p. 1034. Howell’s edit.



sanction to judicial combats in earlier times, had been the cause, or at least the great promoter, of the evil he attacks. "Other offences," says he, "yield and consent to the law that it is good, not daring to make defence and justify themselves; but this expressly gives the law of affront, as if there were two laws, one a kind of gown law, and the other a law of reputation, as they term it. So that Paul's and Westminster, the pulpit and courts of justice, must give place to the law (as the king speaketh in his proclamation,<sup>1</sup>) of ordinary tables and such like reverent assemblies; the year books and statute books to some French and Italian pamphlets which handle the doctrine of duels, which, if they be in the right, *transeamus ad illa*, let us receive them and not keep the people in conflict and distraction between the two laws." But it was not the ordinary table, nor the French or Italian pamphlet, which originally fostered and established the doctrine he reprobates so much, but the pride of chivalry, and the pomp of the lists, with fame as the successful party's mead, and princes as spectators, and God himself as the invisible but no less present and controlling judge.

The remedies which Bacon points out are not of that efficacious nature which might be expected from his fertile mind. He proposes "that there do appear and be declared a constant and settled resolution in the state to abolish it, like unto that which was set down in express words in the edict of Charles the Ninth of France concerning duels, that the king himself took upon him the honour of all that took themselves grieved or interested from not having performed the combat."

In his vindication of the law of England he is more successful. "Now for the law of England, I see it excepted to, though ignorantly, in two points. The one, that it should make no difference between an insidious and foul murder, and the killing a man on fair terms, as they now call it. The other, that the law hath not provided sufficient punishment and reparations for contumely of words, as the lie and the like." He points out the impracticability of the last, and the absurdity of both. After admitting that a distinction between murder and manslaughter has some show of reason to support it, "but for a difference to be made in case of killing and destroying a man upon a forethought purpose between foul and

<sup>1</sup> A recent proclamation against duelling, probably by Bacon's advice.

fair, and as it were, between single murder and vied murder, it is but a monstrous child of this latter age, and there is no shadow of it in any law, human or divine." This leads him naturally to the topic of trial by battle, an awkward one for his argument, and which he rather hastily slurs over, condemning it however, but in somewhat measured terms. This moderation was perhaps necessary with such auditors, for the court, in their sentence, noted that these private duels and combats were of another nature from the combats which have been allowed by law, as well of this land as of other nations, for the trial of rights and appeals. They gave warning to young noblemen and gentlemen of the severity they would in future use, and sentenced the unlucky plebeians, whom the Attorney-general had singled out for example, to imprisonment, the principal to pay five hundred pounds, and the second five hundred marks fine.

From this time the Courts of law in such trials as have come down to us, seem to have taken as strong and decided measures to put a stop to duelling, as its most zealous opponents could desire. If some offenders on this score escaped, it was always from the sympathy and compassion of the jury, not from the indulgence or irresolution of the judge. We shall mention one or two of the more remarkable cases in which the law was most accurately defined or most firmly enforced.

The trial of Bromwich seems the first important one. He was indicted for aiding and abetting Lord Morley in the murder of Hastings in a duel. His was therefore the case of a second only. At least we must so assume it with regard to the law laid down by the court in the case, for though he was accused of giving an actual wound with his own hand to Hastings, no notice was taken of that in the direction to the jury, who were told to find him guilty on this ground, that as Lord Morley did not fight immediately upon his quarrel, alleging the height of his shoes as a disadvantage in a room, but presently went into a field and fought there, this caution and delay showed so much reflection and self-command as put it quite out of the question that he fought under the influence of sudden and uncontrollable passion, which alone could reduce his offence to manslaughter. The jury, however, were like most juries,

much disposed to favour the prisoner, and acquitted him notwithstanding this positive direction of the judge.

But the case of all others in which the subject was most elaborately discussed is the notorious one of Major Oneby, and of that it is therefore necessary, although it may already be familiar to the reader, to give a more detailed account. It occurred rather more than a century ago, and may be considered as having settled the law, at least as far as regards principals. It is reported in 2 Str. 766, and more fully in *Ld. Raym.* 1489, and 17 St. Tr. 80, Howell's Edit.

The quarrel arose at hazard. Oneby, Rich, Gower and some others were playing at hazard. The first (who was by the way a noted gambler) had been unlucky. Rich proposed to set three half-crowns, which Oneby accepted and lost. At the same time Gower, in answer to Rich's proposal, jocularly set down three half-pence. After the throw Oneby, vexed probably by his loss, called Gower an impertinent puppy for setting half-pence, to which the latter replied that whoever called him so was a rascal. Oneby then threw a bottle at Gower, and Gower tossed a bottle or a glass at Oneby, and they rose to take their swords. Gower reached his first and stood waiting with it drawn, but before Oneby could join him the rest of the party interfered. They then sat down again for about an hour, after which Gower said, "We have had hot words, but you were the aggressor; but I think we may pass it over," and offered his hand. To this Oneby replied, "No, damn you, I will have your blood." Soon afterwards all the company departing, Oneby remained last in the room, and called after Gower who had left it, "Come back, young man, I have something to say to you." Gower on this returned, and the door was fastened; a clashing of swords was heard, and on persons entering Gower was found mortally wounded. Being asked on his death-bed whether he received his wound in a manner considered fair among swordsmen, he said he thought he did. This is the substance of the special verdict found by the jury. There being a year's delay in bringing it on for argument, Oneby became so confident as to move for a concilium to have it decided, and it was accordingly argued in the King's Bench, and subsequently before the twelve judges. All were unanimous in considering it to be murder, and Oneby

was accordingly sentenced to be executed, but committed suicide to avoid the infamy. The circumstances of the case as regards the small or no provocation, the temperate proceeding of Gower on being insulted, his subsequent disposition to make up the quarrel, and Oneby's malignant threat, were certainly remarked on by the judges, but still the case was decided on the broad principle that as an hour had occurred between the quarrel and the combat, there was such time for cooling and reflection as made it impossible to mitigate the offence to manslaughter. Lord Raymond, in his judgment, after quoting Morley's and Mawgridge's<sup>1</sup> cases, observes, "From these cases it appears, that although the law of England is so far peculiarly favourable as to permit the excess of anger and passion in some instances to extenuate the greatest of private injuries, as taking away a man's life is; yet in these cases it must be such a passion as for the time deprives him of his reasoning faculties; for if it appears reason has resumed her office; if it appears he reflects deliberately and considers before he gives the fatal stroke, which cannot be as long as the fury of passion continues, the law will no longer, under that pretext of passion, exempt him from the punishment which, from the greatness of the injury and heinousness of the crime, he justly deserves, so as to lessen it from murder to manslaughter."

If the authority of books of practice were wanted to confirm these opinions, we have that of the most celebrated writers on our criminal law, of Forster, Hale and Hawkins, who unite in laying down these two maxims:—First, that wherever two persons quarrel over night and appoint to fight next day, or quarrel in the morning and agree to fight in the afternoon, or at any time afterwards so considerable that in common intendment it must be presumed that the blood was cooled, the person killing will be guilty of murder. And, secondly, that wherever two persons in cold blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder and cannot help himself by alleging that he was struck, or that he declined the meeting at first, or that he meant not to kill but disarm, or that his intent was only to

<sup>1</sup> Mawgridge's case was one of unquestionable murder, whether duelling be so or not; we have therefore forbore to quote it.

vindicate his reputation, (as when he had been threatened with posting). Lord Hale in one particular, however, takes a milder view than other judges, for though he fully agrees that not the principal only but his second also is guilty of murder, he considers it a severe construction of the law to hold that the second also of the person killed is equally guilty by reason of the countenance given to the principal, and of the compact. Every incidental opinion of so great an authority deserves and will receive our respect, but it is not too much to say that the whole spirit of our criminal law as regards accessories before the fact runs counter to this notion, and that such decisions as have occurred more modernly on this point are uniformly the contrary way.

But however consistent and determined our most eminent lawyers may have been, both in the court and in the chamber, in bringing fatal duels within the compass of murder, there is one tribunal which has spoken and acted upon entirely different principles and with little respect for the opinion of our judges. The House of Lords has, at several times, entertained some of the most unquestionable cases of combats in cold blood on record, and has decided all by a real, and often too a verbal, exculpation, by a verdict of manslaughter or not guilty, and as our readers know, manslaughter is a privilege of the peerage. We will not here speak of their two acquittals of Lord Mohun for the murders of Mountford and Coote, because the first was an undisguised assassination, and in the other the evidence did not very satisfactorily bring home a participation in the crime to his lordship.<sup>1</sup> But their more

<sup>1</sup> This ruffian escaped the justice of his country through a protracted life of crime, but met with his desert, though late, at the hands of the Duke of Hamilton. Swift gives so lively an account of the occurrence in his journal to Stella, that we cannot forbear quoting it. "London, Nov. 15, 1762. Before this comes to your hands you will have heard of the most terrible accident that almost ever happened. This morning, at eight, my man brought me word that Duke Hamilton had fought with Lord Mohun, and killed him, and was brought home wounded. I immediately sent him to the duke's house in St. James's Square; but the porter could hardly answer for tears, and great rabble was about the house. In short, they fought at seven this morning. The dog Mohun was killed on the spot, and while the duke was over him, Mohun shortened his sword, stabbed him in at the shoulder to the heart. The duke was helped toward the cake-house by the ring in Hyde Park (where they fought) and died on the grass before he could reach the house, and was brought home in his coach by eight, while the poor duchess was asleep. Macartney

recent trial of Lord Byron deserves a more attentive notice, because subsequent as it was to Oneby's case, which in most particulars it very much resembles, it set at nought the collective opinion of the judges there and the law of England as then established. This very unprovoked and ferocious duel is well known through the celebrity of the descendant of one party, who seems to allude to it in his writings with feelings more of pride than of shame, as shedding the dignity of hereditary hatred upon the houses of Byren and Chaworth, rather than proving the meanness and malignity of one bearer of the family honours at the least. The circumstances were briefly these:—Lord Byron and Mr. Chaworth were dining with a party at a tavern. A discussion arose about the quantity of game on the manors of their common neighbour, Sir Charles Sedley. Lord Byron, who was contending for the superiority of his own, was at last provoked to say, that he knew of no manors of Sir C. Sedley, to which Chaworth replied, "The manor of Nuttal was his, and one of his ancestors bought it out of his family, and if your lordship wants any further information about his manors, Sir C. lives in Dean Street, and your lordship knows where to find me in Berkeley Row." Here the conversation dropped. They sat for an hour after in company, conversing on indifferent subjects, and Lord Byron appeared particularly cheerful and good-humoured. Mr. Chaworth went out first, but Lord Byron met him on the stairs and said, "Sir, I want to speak to you." They called a waiter to show them a private room, and went in. It was lighted only by one small tallow candle. Lord Byron then asked whether he was to have recourse to Sir Charles Sedley or him to account for the business of the game. Chaworth said, to me, my lord, and if you have any thing to say it would be best to shut the door lest we should be overheard. He then went to the door to close it, and on turning saw Lord Byron just behind him with his sword half-drawn. He drew his as quickly as he could, and after exchanging a few passes, his sword got entangled in Lord Byron's waistcoat, and the latter then stabbed him mortally. Lord Byron was tried

and one Hamilton were the seconds, who fought likewise and are both fled. I am told that a footman of Lord Mohun stabbed Duke Hamilton, and some say Macartney did so too. Mohun gave the affront, and yet sent the challenge.

before the Lords, acquitted by some peers and found guilty of manslaughter by the rest, when he pleaded his privilege and was discharged.<sup>1</sup> Undoubtedly the facts of Oneby's case were more atrocious, but, nevertheless, there was the same time for cooling, the same want of provocation, and the same determination to bring the matter to a bloody issue. The one decision must, we think, be taken therefore to have gone directly counter to the other.

Whether occasioned by the example of the Lords, the growing sympathy of juries, or the declining conscientiousness of judges, it is certain that in later times convictions in cases of duel have been extremely rare. Blackstone himself seems to give a sort of license to the practice by the way in which he qualifies his exposition of the law, which he was obliged to take as he found it in the older writers. Speaking of the doctrine of "express malice," he says, "This takes in the case of deliberate duelling, where both parties meet avowedly with an intent to murder, thinking it their duty as gentlemen, and claiming it as their right to wanton with their own lives and those of their fellow creatures; without any warrant or authority from any power, either divine or human, and in direct contradiction to the laws both of God and man; and therefore the law has justly fixed the crime and punishment of murder on them and on their seconds also. Yet it requires such a degree of passive valour to combat the dread of even undeserved contempt arising from the false notions of honour too generally received in Europe, that the strongest prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy custom, till a method be found out of compelling the original aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable as that which is now given at the hazard of the life and fortune as well of the person insulted as of him who hath given the insult."<sup>2</sup>

Among those modern cases of duelling which have excited the most interest, there is one which stands pre-eminent, both on account of the interest of the circumstances and the ability of the defence. We allude to the trial of Mr. Stuart for the

<sup>1</sup> St. Tr. Howell's Edit. v. 19, p. 1177.

<sup>2</sup> Bl. Comm. vol. iv. p. 199.



murder of Sir Alexander Boswell. It will be remembered that the facts of that case were, that some anonymous libels of a very gross nature on the character of Mr. Stuart having appeared in a newspaper called the Beacon, he was unhappily enabled to ascertain beyond a doubt that Boswell was the author, and conceived himself therefore obliged to require some apology, which being refused, they met, and Mr. Stuart, certainly with no violent animosity in his mind, had the misfortune to kill his antagonist. The defence of his counsel, Mr. Jeffrey, has been generally esteemed a master-piece, and is, at least, a summary of the chief arguments in favour of duelling and the principal modern instances of it, and is so far deserving of the best attention which a very meagre report of his speech enables us to give.

The Lord Advocate of that day having told the jury at the conclusion of the evidence, that the offence of murder had been unquestionably proved, but in a manner that shows he had little expectation of a conviction, was followed by Mr. Jeffrey on behalf of the accused, who feeling that he had to contend against a heavy mass of legal precept and precedent, was obliged to exert more than his customary ingenuity in the defence. The line of argument which he pursued was briefly this:—That first, as the indictment had set forth that the prisoner, having conceived malice and ill-will against Sir Alexander Boswell, did, in furtherance of that malice and ill-will, wickedly and maliciously, &c. The plea of “not guilty” merely resolved itself into this, that although the pannel’s hand was the cause, yet he did not kill Sir Alexander wickedly. His mind was free from every spark of vindictiveness—he felt no personal animosity. This absence of all malicious feeling he assumed to be proved, as it seems to have been, by the evidence. But it was still his duty to satisfy them that such a defence was admissible.

For this purpose he proceeded to show, that the practice of duelling had much excuse for its existence. It ought, he said, to be remembered, that however imperfect or immoral the remedy may appear, it had come as a corrective of greater immoralities, and greater crimes. It is an historical fact, that it has superseded the guilt and atrocity of private assassination; and to it society is indebted, not only for the polish which belongs

to the higher ranks, but also for the universal dissemination of fairness and forbearance, and gentlemanlike conduct, for the open courage which distinguish civilized nations. It secures humanity—generosity of sentiment. It operates in the prevention of atrocities and crimes. Look to the different Christian nations for examples. In Spain, Portugal, and Italy, where the practice of duelling is unknown, poisonings, assassinations, and most cruel murders are of daily occurrence; but where duelling is looked upon as the only appropriate remedy for personal injury, such enormities are unheard of.” This argument, that the nations of the south of Europe assassinate because they do not duel, is a somewhat singular, though not a novel instance of, how finely cause and effect are connected in some minds. The only parallel to it that we know is that venerable doctrine, that the English nation are valiant because they indulge in prize-fighting; we believe it will be found on inquiry, that the time of the most duels in France was the time of the most assassinations there. Observe, too, the inconsistency of the argument. Mr. Stuart is to be excused because he fought a duel without one particle of malice; yet the fighting of duels is to be excused because if men could not gratify their malice in that manner, it would lead them even to assassination.

Mr. Jeffrey further supported his defence of the practice by the opinions of Dr. Johnson, as recorded by Boswell; so that the writings of the father of the unfortunate deceased were pressed into the service of vindicating the slayer of the son. But as the “great moralist” had some slight leaning towards paradox, and a trifling turn for display, we should have preferred other authority to his reported conversations. It seems, however, that Dr. Adam Ferguson and Lord Kames entertained the same opinions. Having thus endeavoured to satisfy the Jury that duelling was an excusable and necessary evil, Mr. Jeffrey proceeded to reiterate his observations on the score of malice. He said that he called upon the Jury to pronounce no untruth in their verdict—but merely not to allow their verdict to be the vehicle of any thing but truth. The point was, whether there was evidence that the prisoner killed his opponent maliciously. No doubt, our law-books said, that a duel was and ought to be considered as murder; but he could not help saying, that he looked upon the excellency of the criminal law

•

of this happy country, not to consist in the barbarous severity of antiquated statutes, nor even in the dicta which might fall from those high and stern magistrates of the land, who are bound to assert the severity of the code of law which they uphold, and who naturally attach much respect and reverence to what they administer, but to consist in the authorized and approved practice of the courts, enlightened by the approved, popular, and harmonious verdicts of juries.

He urged, that the doctrine of all duelling being murder, was derived from a period when the state of the country required such severity—from a time when the abuse of duelling had grown a monstrous and unbearable evil. It was not so now. During one of the longest reigns, namely, of George III. there were in Great Britain and Ireland 170 duels fought, and under sixty or seventy persons killed; yet there were not above eighteen or twenty trials. These eighteen or twenty, of course, included not only the bad, but all doubtful and questionable instances, and out of these there had been only two or three capital convictions, facts which showed that the practice of duelling did not prevail in this country to any very alarming extent. He mentioned a few of the more remarkable cases; among others, that of Major Campbell, who was executed in Ireland for killing Captain Boyd. This, however, more resembled an assassination than a fair duel. The principals were officers in the same garrison, where seconds could easily have been had, yet they fought without seconds, and in a room: and it was impossible to get over the last words of Captain Boyd: “You are a bad man, Campbell, you hurried me.”

He quoted also the case of Glengary, with a remark that Burnet in his criminal law said, it ought to have had a very different issue. Glengary took offence, as it appeared, without the smallest cause, at some observation made to him by Lieutenant M’Leod, in a ball-room, about dancing with a particular lady. From high words, they came to blows; and it was distinctly proved, that Glengary struck the deceased repeatedly in the ball-room, first on the head with his cane, and then on the face with his fist, and latterly on the breech with his foot. The next day Mr. M’Leod’s friends waited on Glengary, to demand satisfaction for the outrage he had com-

mitted. Glengary, sensible of his error, offered to make any apology; but M'Leod required that the same cane with which he had been struck should be put into his hand to use as he might see fit. This, perhaps, was a condition, to which no gentleman could accede. They fought—M'Leod fell. The Jury returned a verdict of "Not Guilty," but accompanied with an important note, in which they rested the acquittal on the apology which Glengary had been willing and offered to make, adding, that but for this, their verdict might have been of a very different nature.

Still urging the necessity of proving malice, Mr. Jeffrey concluded with the following eloquent appeal. "Look at the facts of the present case. Here there was no rancour or vindictiveness. The pannel was more in sorrow than in anger. Consider the circumstances of the atrocious, unmerited, unceasing abuse heaped on him: and how could he be expected to remain the passive victim of such insults when their author was discovered? Look to the prisoner's conduct before the duel—to his behaviour throughout. In the very event you have a fresh instance of the extreme placability of Mr. Stuart's disposition, joined with such honourable firmness and constancy. In the cool anguish of his own heart, he saw he could do nothing else than call Sir Alexander into the field; but he had no feeling of virulence, of rancour, from first to last. His name was stained—his heart torn—and life made more intolerable than death; yet he sought not this meeting to soothe wounded vanity or to indulge in rancour. The combat was forced on him. This person, who was reviled with names which cannot be repeated,—who, as a "coward," should have rejoiced in his escape—and, as a "ruffian," have exulted in his victory, melted into tears when his antagonist fell. When driven into a foreign land, he there waits in breathless agony the fatal result; and when the melancholy tidings reach him, his burst of grief was overwhelming and frightful."

Such is a brief summary of this celebrated speech. The result was an acquittal; but it is impossible to read the trial without perceiving on what unstable ground Mr. Jeffrey felt himself to stand. As far as his address was to the reason of his hearers, he found nothing to insist on but the single topic of want of malice. Now the law of Scotland is the same as

the law of England on this point, and we have shown most completely that the latter does not recognise the possibility of the deliberate slaying of one man by another without malice being of necessity implied. Whether this legal fiction be laudable or not, it puts the circumstances of each particular case quite *hors de combat*, and leaves to the advocates who defend prisoners under such charges, no choice but to mistate the law, and to the juries that acquit them, no choice but to violate their oath.

The recent trial at Exeter of Messrs. Milford, Holland, and Halsted, for the murder of Dr. Hennis, presented another painful instance of this anomaly. The circumstances, as detailed in the newspapers, are fresh in the memories of all our readers, so that time would be uselessly consumed in restating them. The evidence which came out was in no respect remarkable or unexpected, except so far as it served to remove a good deal of the unmerited obloquy which had been cast on two of the three prisoners, who had acted as the friends of Sir John Jeffcott. Nevertheless, the whole detail of a deliberate duel was clearly and completely established, nor was there any thing extenuatory in the circumstances which led to it on the conduct of the party who so unhappily perished. Such being the case, much, it might be supposed, would depend upon the summing up of the judge. It is impossible to speak too highly of the intrepid honesty and severe rectitude of Mr. Justice Patteson on this occasion. Those who know that wise and amiable judge best, can not suppose that it was from any indifference or want of sympathy for the situation of the prisoners, or without much pain and violence to his own feelings, that he did his duty on this occasion; but he did it nevertheless. A few extracts taken down on the spot from his charge to the jury, will fully show that he neither mistated nor obscured the law.

“ It is my opinion, from the evidence, that the offence is of the highest description or none at all.

“ It is charged with malice aforethought, because without that no murder could be committed, but there is no charge in the evidence of particular malice or ill-will toward Dr. Hennis. The malice here meant is that species which

arises by implication when people go out to commit an unlawful act, and death ensues in consequence.

“ It is no answer to the charge of murder in a deliberate duel, to say that it was done solely to vindicate reputation.

“ There have been many instances in the three kingdoms, where gentlemen have stood at the bar in the same unfortunate circumstances as these, and the juries have acquitted them. I do not mean to say that by so doing they violated their oaths. I will take it that they did not, though I may not see on what grounds they did so.

“ As far as manslaughter is concerned, the question here will be merely whether they had time to cool. These parties were never hot.

“ Whether duelling ought to be tolerated in this land, I say nothing. It is no question for any jury at all. The law of the land *does* not tolerate it.

“ I repeat, if you are satisfied on this evidence, that the three gentlemen went out to Haldon, knowing that Sir John Jeffcott and Dr. Hennis were about to fight a duel there, without heat or irritation, but deliberately aiding and assisting the affair on a point of honour, after vainly endeavouring to effect an amicable arrangement, I cannot tell you in point of law it is any thing short of murder.”

Such a charge gave, of course, extreme alarm to the advocates and friends of the parties, and appeared to place the jury in a most embarrassing predicament. The law had been too clearly laid down for them to escape by the middle path of manslaughter. The completeness of the evidence seemed to put acquittal almost out of question. It was with breathless anxiety and alarm that the whole Court awaited the result of the jury's deliberation. But they were not slow, nor seemingly perplexed. After the lapse of a few minutes they turned round and pronounced an entire acquittal, but not indeed with the same readiness as to all the parties. The names of Milford and Holland being first put to them, they answered readily “ not guilty,” but at that of Halstead they paused, and for a moment resumed their private conference. Astonishment and vexation seized the minds of every person present. This latter gentleman had been the second of the deceased. Although evidence tending to place his conduct

on the occasion in a very honourable and amiable point of view, contained in the dying declarations of Dr. Hennis, had been excluded on the trial, by an objection ably taken by Mr. Serjeant Wilde and admitted by the judge, that as these were statements of opinion, rather than of fact, they did not fall within the rule that dying declarations are admissible; it was still proved that he had done all in his power to prevent the duel, and it was felt by all that he was of all the parties the least blameable. The jury, however, after a short pause, acquitted him also. This delay seems very difficult to account for. It has been said, we know not with what truth, that the sagacious foreman had given such minute and careful attention to the evidence during the progress of the trial, that on the name of Halsted being submitted to him, he turned round with a puzzled look to his fellows, exclaiming, "Halsted, who's he, I never heard of he?" to which another more sagacious, replied, "never mind, say they're all not guilty,"—a recommendation which he fortunately obeyed.<sup>1</sup>

Whether the stupidity or inattention of this particular jury reached thus far, we cannot say; but at any rate, it is high time that the finding of verdicts, in direct opposition to the facts proved by the witnesses and the law taught by the judge should cease, and that an end should be put to what have been called "pious," but what we conceive to be most impious perjuries. Mr. Jeffrey, in his defence of Stuart, could find no better argument for the jury's finding a verdict contrary to law than the precedent afforded by the custom of returning, "Guilty of stealing under 40s.", where the theft had really been much larger; but the prisoner's life was not intended to be forfeited. Happily the enactment which made this "pious perjury" necessary, no longer disgraces our statute book. Why should the unnecessary severity of the law regarding duels, if unnecessarily severe it be, any longer remain a vexation for the judge's feeling, a stumbling block for the juror's conscience, and a dead letter for all the world beside. In such a case we shall not venture to suggest any particular remedy,

<sup>1</sup> Captain Halsted was allowed a chair during the trial, and when in a sitting posture could with difficulty be seen from the jury box. There can be no doubt, that all the parties escaped entirely through the ignorance of the jurymen, one of whom subsequently stated the ground of their verdict to be, that "they (the prisoners) never titched (touched) him (the deceased)."—*Edit.*



but any thing must be better than the present system. A severer or a milder course, an enforcement of the law so rigorous as to put an end to duels altogether, or a toleration of them within certain limits, and subject to certain moderate punishments, would be alike preferable to the present solemn mockery of justice, the scene of absurdity and want of conscience, which trials like this at Exeter exhibit.

S.

---

ART. VII.—GERMAN CRIMINAL TRIALS—(continued).

---

*Aktenmässige Darstellung merkwürdiger Verbrechen, von Anselm Ritter von Feuerbach, Staatsrath und Präsidenten; Zweiter Band.—(Documentary Exposition of Remarkable Crimes, by Anselm von Feuerbach, Knight, Counsellor of State and President. Second Volume.)* Giessen. 1829.

THE interest excited by our selections from the first volume of this work emboldens us to continue the article; but, not to weary our readers, we shall confine ourselves to two of the most interesting cases contained in the second volume, which must be detailed at more than ordinary length.

The first case of the second volume is entitled, "*George Wachs, or the Seduction of the Moment*:" the particulars are these:—

A mile and a quarter from Bilsbiburg, upon a rising ground about two hundred paces from some mills, lies a solitary cottage. This belonged to a poor honest cobbler, one Jacob Huber, a man about forty-two years of age, who lived in it with his wife and three children; namely, a daughter, nine years old, named Katharine—a boy, three years old, named Michael—and a child in arms, about two months old. The second half of this cottage, which had a separate entrance, was rented by a day-labourer named Maier.

Maier, on returning from work on Thursday evening, the 8th of April, 1819, at half-past six o'clock, was surprised that, contrary to custom, all was perfectly quiet at his neighbour's, and nothing was either seen or heard of the cobbler's people. His (Maier's) sister-in-law, Maria Wieser, who had remained the whole day at home, had seen the cobbler's wife go out about three and return home about six; she had also heard her laugh aloud, on the door being opened to her after knock-

ing, as if it struck her as laughable to find the door closed at so early an hour, or as if on entering something unexpected had presented itself. Since that time Wieser had seen no one belonging to the cobbler's family. On the following morning, also, it was as if the whole family were dead; no smoke rose from the cottage chimney, the door continued shut, no sound was heard from within, and even after repeated knocking, nor door nor window was unclosed. At length, after repeated calling, the cobbler's daughter Katharine peeped, with bloody and disfigured features, out of the window of the upper story, refused at first out of fear to come down, but at length, after much persuasion, opened the house door; and the first glance fell upon the body of the cobbler's wife, lying in her blood. Upon the first step of the stairs leading to the upper story was discovered the body of little Michael, rolled together like a hedge-hog. In the cobbler's work-place, which in many places, particularly near the cobbler's overturned stool, was much marked with blood, lay in the middle the cobbler's great iron hammer upon the floor; and in the sleeping room, by the bed, the body of Huber, with the face towards the ground. On the bed, by the side of the father's body, slept, half stiff from cold, but uninjured, the infant of the murdered wife. All the bodies were found in their ordinary clothing, the cobbler still girt with his apron.

As no signs of force were observable on the outside of the cottage, it was at first thought that the family had murdered one another—unless they fought like Kilkenny cats, it is not easy to conceive how this could have occurred—but on inspecting the interior of the cottage it immediately became evident that this was altogether a groundless supposition. Drawers had been forced open, and various articles of property were missing; the position of the bodies also, as well as the nature of the wounds, showed that some individual, other than the members of the family, had been concerned. The deaths of all the murdered persons, the cobbler, the cobbler's wife, and the boy, appeared to have been the immediate result of heavy blows inflicted with the great iron hammer, and the little girl had been severely wounded with the same instrument, so severely that for some time she was incapable of giving any clear information.

This much was at length collected from her: "that she was

knocked down by a fellow who wore a high hat and a blue coat, that this man had been often at her father's before, that he had also been there on the Thursday in question, and sat a long time in the work-place with her father." This account derived additional weight from the declaration of Maier's sister-in-law, who deposed to having seen such a person enter the cobbler's house on the day in question. It was also confirmed by a young man who had cut the cobbler's hair on the day of the murder, and seen such a person as the child described in the house. This person was immediately identified as one George Wachs; who was apprehended accordingly. The morning after his arrest, the first day of Easter, on the entrance of one of the inferior ministers of justice into his prison, he made a full and unequivocal declaration of guilt: "I must own that I am the murderer of the cobbler's folk. All is over with me. I should have confessed myself to-day, and then have gone of my own accord to the court." He then made his Easter confession to the judge, instead of to his father confessor.

George Wachs, born in 1800, and consequently nineteen years of age at the time of the murder, was the son of poor but honest parents, who, at the age of fourteen, apprenticed him to a miller. He served to his master's entire satisfaction for three years, at the end of which period he became free to work for himself. For yet another year he appears to have been remarkable for honesty and industry, but from his eighteenth year his character underwent a total change, and he lost place after place by his idleness and inattention. The reason, as explained by M. Feuerbach, appears to have been, that at this age an inordinate passion for women came over him, by which all his thoughts and wishes were absorbed.

On the day of the murder he had obtained leave from the master he was then serving to go and make his Easter confession at Bilsbigurg. On the way he fell in with an acquaintance, with whom he kept company for a time. It appears that about midday they stopped to refresh themselves at a neighbouring village, and drank a considerable quantity of beer, sufficient to raise Wachs' spirits to a high degree of elevation, though not sufficient to get the better of his reason. He parted from this companion with the professed intention

of getting his boot mended, and entered the cobbler's avowedly for this purpose at about three o'clock in the afternoon. After waiting about an hour, during which time the cobbler mended the boot, he inquired of the cobbler if his clock was right, as he wished to continue his journey about four; upon which the latter, remarking that the clock was about a quarter of an hour too fast, desired his wife to bring him down his watch, that he might wind it up. The wife, after bringing the watch, which the husband wound up and then hung against the wall, left the house to buy fish for the next day. The children also left the room and went into the garden to play, so that Wachs was left alone with the cobbler in his workplace. He declared that he should have gone away with the wife, had not the husband detained him, saying, "stay here a little longer, you can do nothing more to-day, and the time will seem long if I am left alone." The wife subsequently stated that she left the house reluctantly, having conceived a sort of undefined apprehension of Wachs, who talked in so peculiar a manner, that one while she was induced to laugh with him, and then again was inspired with horror of him. Fourteen days before, she had also expressed a similar feeling of dislike. The following details were communicated by the criminal himself:—

"After the woman had gone away," says he, "we conversed at first about indifferent matters, and for a long time no evil thought suggested itself, though I saw the cobbler's watch constantly before me. At length the watch struck me as being so fine; I took it down from the wall, closely inspected it, opened it, and asked the cobbler what it cost; to which he answered, that together with a chain and seals it had cost fourteen florins; but that he only wore the chain, which was above in a drawer, on holidays, when I might sometime or other have a chance of seeing it. I said, I should like to purchase it, if I could ever get money enough together; to which he showed himself perfectly willing. But the watch was never out of my sight or mind; constantly considering it, I walked up and down in the room, and one while the thought came upon me to take it and run off so soon as the cobbler should have left the room. But he stirred not from his workplace, and kept working on at the upper leathers of a pair of

shoes. The attraction towards the watch grew stronger and stronger in me, and whilst walking up and down I considered how I could get possession of it, and as the cobbler still kept his seat, at last I came upon the thought, what then, if thou wert to knock his brains out. I saw the hammer, took it before the cobbler's eyes into my hand, and did as if I was playing with it. But I did not yet complete the deed, for I was still considering within myself that it would not be right to strike him. With the hammer in my hand I walked up and down a few minutes more considering behind the cobbler's back. Soon, however, the desire for the watch became too strong in me; I thought to myself, now is your time, or the wife will be back. And now, whilst the cobbler was fully engaged in his work, I suddenly raised the hammer and struck him with all my might on the left side of the head, so that he dropped from his seat, bleeding violently, without motion and without uttering a cry. I thought to myself that I would give him a right good knock. It may be about a quarter of an hour that I walked backwards and forwards considering how I should get possession of this watch; at last I struck him, and this was now my last and also my wickedest thought. I myself know not by what unhappy destiny so strong a desire for the watch came over me. I had never thought of it before; neither should I have entered the cobbler's house at all, if I had not had a rent boot. As soon as the cobbler was stretched upon the floor, I secured the watch as fast as I could, and went up stairs to look for the chain. In the closet the key was in the drawers, and as I fancied that the cobbler's folk must certainly have kept all their best things here, I looked for them, but did not find the chain, but only two sheep-skins for breeches, of which I possessed myself. As I was standing with the skins upon the stairs, about to go down, I remarked above upon the landing-place two other chests of drawers; hereupon I turned and burst them open with a potatoe-hoe, and thought to myself, here is probably the watch-chain which I should like to have for the watch. I ransacked the whole, and found no chain; but I found six florins and thirty kreutzers, and a silver buckle. In the same drawer was also a hat with a silver buckle of filigree work, which I cut off and secured. (He then details the different

articles found in the drawers.) My main object was still to find the silver chain, and it was only because the other things came in my way as I was looking for it that I took them. When I had got all these things I went down into the room to get a piece of leather to take with me. There I heard the cobbler still making a rattling in his throat, and I struck him several blows with the hammer about the temple and ear, and then I bethought me that I had better put the cobbler into the bedroom, that his wife might not see him immediately on her return. So I dragged him out of the room into the chamber by the bed."

He was now, after stuffing his pockets with leather, about to depart, when he was met by the two children at the door. As both knew him, he was sure to be discovered if they were left alive. No choice seemed left, he seized the boy Michael and threw him against the stairs with such force that the death-rattle instantly began. The little Katharine, also, he flung with equal violence amongst a heap of wood and iron work at the bottom of the stairs; but the little girl, after a short time, contrived to raise herself, and attempted to enter the room to seek help from her father; then the murderer again lifted the hammer from the ground, struck the child across the head and face with it, and flung her down again at the foot of the stairs, where she lay motionless, and was held by him for dead. At this time Wachs heard the little Michael make the rattling noise in his throat again. "When I saw (continues the confession) that I had flung him with such force that it was impossible for him to come to himself again, I gave him a few more knocks about the head with the hammer to shorten his sufferings. And afterwards I took and threw him between the stairs and an old box, that he might not be easily found."

This second job, says M. Feuerbach, was thus completed, but before he was well aware of it, out of the bloody seed of his deeds, immediately under his hands, had already another harvest sprung up. As soon as the children were sent after their father, he prepared himself for instant flight, but first looked cautiously out of the window to see if there was any spectator near. Unluckily a man drove by with a carriage. He was obliged to wait until this had got to the proper distance.

Now at last did he suppose that he might safely leave this house of horrors in safety. Already is he stretching his head out of the door to see once more that no one was watching him—what does he see? the cobbler's wife returning from Solling! she is already on the path leading to her garden—she is only six paces from the house—he cannot go out without being seen by her, without almost running into her arms. He must consequently remain, and murder her too, because he has already murdered her husband and children. “When I saw the cobbler's wife coming, now, thought I to myself, it is impossible for me to get out; I am lost, and must put her to death with the rest. I closed the door, caught up the hammer, held it in one hand concealed under my coat, and with the other opened the door to the woman, who entered laughing with the words,—‘why you have actually bolted yourself in.’ I made no answer. Immediately on entering, she turned her body towards the chest upon the house-floor, which stood open; as I had so rummaged it for the chain. I stood next the door behind the woman's back, and before she was aware, fetched her a violent blow with the hammer upon the left side of the head, right upon the temple, so that she fell down alongside the chest, with only the low cry, *Jesus, Maria*. As I saw that she must die at all events, and that she might not have to suffer too much, I gave a few more blows as she lay upon the ground, and then I shoved her sideways towards the room door, for fear persons entering the house might tread upon her. After this I went into the chamber, threw a cloth with eggs, which the woman had brought with her, behind the stove, and the hammer upon the floor, *hastily placed the baby, which was still lying upon the bench, upon the bed, lest it should fall down and hurt itself*; hastened out of the house, closed the door, and went straight back to my master's, where I might have arrived about half-past six.<sup>1</sup> The whole affair could not have lasted a full hour. I must have knocked down the cobbler about five—the cobbler's wife came in about six. Had it not been for the chain, so great a misfortune would never have befallen me, and I should have

<sup>1</sup> Feuerbach here remarks in a note, that this complicated murder had not stained either the clothes or person of the murderer with blood; only on his boots, as he himself says, were any spots of blood to be seen, which he easily wiped away.



stopped at the cobbler. I had no thought of the cobbler's wife and her children." He subsequently adds: "I felt somewhat elevated with liquor, but I was fully aware of what I was about; for otherwise I should not have been able to bring these things to an end. I myself know not what was the matter with me: on that day I was right merry and free from care." The very day of the murder he gave a striking proof of his utter unconcernedness by looking on, as an apparently unmoved spectator, whilst the dead bodies of his victims were carried to the church. This he himself confessed; and, on the judge's further asking him whether he had not, as reported, himself accompanied the funeral train, and been present at divine service, he replied: "No, for I had not any coat on at the time, only a jacket; otherwise I should have gone along with them to see the burying and the funeral service; besides, I should have liked to go to church. I felt for the people; but I could have gone and been present." During the whole of the examinations he continued in the same dogged indifference.

Feuerbach comments upon all the particulars of this case with his usual minuteness. The most curious part of the commentary is the parallel he institutes between George Wachs and Macbeth. "What (says he) a barely prophesied, still future throne was to the noblethane, that, in a much higher degree, was to the common sensual apprentice-boy the treasure of a silver watch, already glittering in his sight. To be master of such a prize, to parade with such an ornament before the girls, and with it not merely to equal but surpass his fellows,—what a thought for a giddy youngster of nineteen!" The compiler also examines at some length the hypothesis that the criminal was not in his right senses at the time; he finds, however, no sufficient evidence for its support, and agrees that the case must rank as one of those, not very unfrequent, where a sudden temptation, acting on a weak indecisive character, leads at once to the most atrocious, though wholly unpremeditated crimes. "Notwithstanding his horrible guilt, Wachs is not to be classed amongst villains of the first rank. Easily-excitabile sensuality, excessive giddiness, together with an entire deficiency in the higher sort of mental developement, these are the elements of his spiritual nature, in which the

deeds of the eighth of April (when he was operated upon by a variety of combining circumstances) had their origin."

He was condemned to the punishment of the sword (beheading), which was duly executed upon him on the 23d of October in the same year.

The second case is called *Tartuffe as Murderer*, and is one of the most singular in the collection. The hero is a priest named Riembauer, born in 1770; a man who, up to the middle period of life, had borne an unimpeachable character, and had even attracted very general veneration by a uniformly precise and sanctified demeanour. Hints as to undue sanctity being the ordinary career of a hypocrite, and allusions to the text in which mention is made of wolves in sheeps' clothing, had been thrown out occasionally by the neighbouring gentlemen of the cloth, but these were pretty generally attributed to jealousy, "and (we are now quoting from Feuerbach) it was only after a series of years, on the occasion of other far more important discoveries, that the following trifling circumstances out of the secret history of this holy man came to light, at least to loud and open notoriety."

As curate at Hofkirchen he got with child the cook, Maria H., who through his intervention was brought to bed of a boy at Landshut in October, 1801, which boy, however, died soon afterwards.

During his stay as curate at Hirnheim, he formed a close intimacy with Anna Maria Eichstädter, the cook maid of the superior clergyman there, and had by her a child, which was born on the 17th of May, 1803, at Regensburg, baptised in a false name, and, four years afterwards, became the innocent cause of its mother's cruel death.

As curate at Pfarrkosen (1808), he made one Walburga R. a mother, who bore him a female infant, still living at the time of the present examination. Over and above all this, a secret report was in circulation, that the cook maid of the incumbent there was also with child by the curate.

At his next cure, Pendorf, he found himself too closely watched by his brethren, and soon quitted it for Pirkwang, where he selected Magdalene Frauenknecht, the daughter of a farmer, for his mistress, an unfortunate, on whom this narrative will subsequently turn more circumstantially, and of whom we shall only remark, in this place, that she bore

him a boy in June, 1807, at Munich, who, however, died six weeks afterwards. Finally, after the death of this maiden, he connected himself with his last cook, Anna Wenniger, by whom he had no less than three children.

With his concubines, with those at least whom he intended keeping for some time, partly to quiet their consciences, partly to assure himself the better of their fidelity, it was his custom to go through the formal ceremony of marriage; Katherine Frauenknecht avers that, concealed behind the bed, she was present at the ceremony between him and her sister Magdalene, and heard and saw how he went through all the ordinary marriage forms, and also placed a gold wedding-ring on her sister's finger. Anna Wenniger relates the same of her own betrothing, only she does not remember whether the priestly bridegroom conducted the affair arrayed in his robes, and with tapers burning. He himself denies any such abuse of his sacred office, but owns that he formally instructed his concubines in the mutual duties of husband and wife, and then gave and took in return a solemn promise. It should be added, that Riembauer, when still a young curate, was wont to insinuate himself into houses where he knew pretty girls to be, and try to induce their parents to let them enter his service as cook maids. Neither, says M. Feuerbach, like that independent saint, Mr. Tomkins, at Rosamond's Well, with the pretty Phoebe Mayflower,<sup>1</sup> was he slow to make his doctrine practically conceivable by the children entrusted to him: that a maiden might well allow herself certain sins with a priest of the Lord. And many other things of the same sort, which may be supposed; since it needs no further proof that the Rev. Mr. Riembauer, during his whole priestly career, was nothing less than an embodied example of that familiar and favourite principle of all outward sanctity:

“ Le mal n'est jamais que dans l'éclat qu'on fait ;  
 Le scandale du monde est ce qui fait l'offense,  
 Et ce n'est pas pécher que pécher au silence.”—*Tartuffe*.

Without having read Molière, Riembauer, together with the art of sinning in secret and ranking as a saint with the world, was thoroughly acquainted with the use of those means by aid of which men manage to clear scores with heaven in

<sup>1</sup> The allusion is to a well-known scene in *Woodstock*.

respect both of by-gone and still enduring sins. Those aberrations of tenderness were not his sins but the sins of celibacy, and his philosophy and morality furnished him with a whole series of the most applicable proofs, that in begetting illegitimate children, whereby he, in fact, contributed to the extension of the kingdom of God, he was doing not merely nothing deserving punishment, but something praiseworthy and pleasing to God. "I considered (these are his very words,) 1. That according to reason, it could not appear unhallowed to beget a child; for to produce a reasoning creature, which shall endure to all eternity, is something good. In respect of his contributing to the production of a human being, does a man become God's image in a remarkable degree, as St. Clement of Alexandria remarks. 2. Neither can it be contrary to God's ordinance, since thereby the number of the elect receives an increase. 3. Nor against the church; if this human being is formed into a true Christian. 4. Nor against the state; provided such a member receive moral and civil instruction, and be thus brought up to be a good citizen and true subject, and the mother be not abandoned. I often occupied myself with these thoughts; the history of the church,<sup>1</sup> and experience also support my doctrines. And so was my spirit light to suffer me to be hurried into such faults of celibacy."

Riembauer supplied in reality to the best of his ability, if not from duty and tenderness, yet out of prudence and foresight, all that was necessary to bring up his children, and also to place their mothers satisfactorily, so that they might remain in that state of contentedness and quiet, which was necessary to the keeping up of appearances. He had the child of Ann Eichstädter brought up at his expense, and maintained, even from a distance, a friendly confidential relation with her. He kept up a correspondence by letter, supplied her with money &c. visited her occasionally, and permitted her to entertain the hope, should he ever obtain a preferment, of living constantly with him as cook. This Ann Eichstädter was the daughter of a carpenter at Furth, a well-built, tall, strong, and broad-shouldered woman, and amongst other things (which on account of

<sup>1</sup> M. Feuerbach suggests that Riembauer probably applied himself to that part of the History of the Church which treats of the lives of John XII., Innocent II., Innocent VIII., John XXIII., Alexander VI. Julius II., and other like worthies.

what follows is not to be overlooked) distinguished by two rows of the most beautiful pearl-white teeth. In her moral character there was nothing blameable but her too great fondness for the male sex; she had born illegitimate children not to Riembauer only, but to many others. The confidential friendly relation between her and Riembauer suffered in the meantime, about a year after his removal to Pirkwang, a violent interruption, which in the end led to her cruel death.

Riembauer's connection with Magdalene Frauenknecht has been already alluded to. The family consisted of her mother and father, Magdalene herself, and a younger sister, Katharine, a girl of about ten years of age, when Riembauer first became acquainted with them. They were people much esteemed, and possessed of some little property, which, along with the elder sister's person, became the object of his cupidity. By an artfully laid scheme, he succeeded in cheating them out of a considerable sum about the same time that he completed the ruin of Magdalene, who proved with child by him in June, 1807, when he was undergoing one of his examinations as priest at Munich. Thither Magdalene accompanied him, professedly in the capacity of cook, and in due time was brought to bed of a boy. The expenses are said to have been defrayed by him out of the money fraudulently procured from the family. Whilst he was thus residing at Munich, his former concubine, Eichstädter, becoming impatient at the intermission of the regular supplies, repaired in person to his house at Lauterbach, introduced herself as his aunt, and ransacked all his drawers and presses for money. Finding none, or not enough for her wants, she addressed first one and then another letter to him, threatening exposure and punishment, unless the arrears of her allowance were paid. He soon afterwards visited her, and managed to soothe her for the time. On taking leave he desired her, with a threatening gesture, to come on no account to Lauterbach. We hear nothing more of Eichstädter until the first of the following November, when she formed an engagement as cook with the officiating clergyman of P., from whom she obtained permission to pay a visit to her relations before entering on the actual duties of her service. She left him accordingly, carrying with her a green umbrella belonging to her new master, with his initials engraved upon it. Several

days elapsing without her being heard of, the reverend gentleman, suspecting that she had gone to his clerical brother, Riembauer, wrote to the latter, requesting him to tell Eichstädter, that, if she had no inclination to enter his service, she might at least send back his umbrella. Riembauer replied, that it was out of his power to give any information as to Eichstädter, having seen neither her nor the umbrella. Farther inquiries were equally vain; nothing was seen or heard of her more, and it was conjectured that she was drowned, or had been made away with by some person or persons unknown.

Some months after her disappearance, in the year 1808, Riembauer received his appointment as parson at Kiel. Thither Magdalene, with her mother and sister, accompanied him; but both Magdalene and her mother soon afterwards died suddenly, Magdalene on the 16th, and the mother on the 21st of June, 1809. The younger daughter, Katharine, had left the parsonage before the mother and sister's deaths, partly on account of disagreements with her sister, partly out of dislike to the parson. She lived at first in his brother's service, and afterwards in several other services. In all she demeaned herself as if something weighed upon her mind, and from time to time she let fall obscure hints of dreadful doings she had been witness to. At length she made a direct declaration to a female with whom she was sleeping of a horrid murder committed by Parson Riembauer, and soon afterwards resolved on clearing her conscience on this subject to a priest. She accordingly repaired to a clergyman named M., and circumstantially related to him that Parson Riembauer, who had cheated her family of more than 2000 florins and deprived her of her home, had cut the throat of a woman who came to him in November, 1807, in Lauterbach, with a razor; that he had removed her own mother and sister by poison, because they were privy to the deed; lastly, he had endeavoured to get herself into his power, in order to get rid of the now only remaining witness of the murder.

The Rev. Mr. M. dissuaded her from a judicial declaration, recommending her to leave Riembauer, in case he were really guilty, to the judgment of God, and afterwards assured her that he had since communicated with several other priests, who were all of opinion with him as to the matter. Another

priest, to whom she told her story, also recommended silence, but wrote Riembauer an anonymous Latin letter, threatening the discovery of certain dreadful mysteries, unless he paid Katherine the money out of which he had cheated her family.<sup>1</sup> This, of course, produced no effect. At length, in the year 1813, she made a formal judicial declaration, which she subsequently confirmed upon oath.

This declaration begins by particularising the first visit made by Eichstädter during Riembauer's absence. "In the same year (1807)," it continues, "in November, the same woman came to Thomesbof. My sister was at home with Riembauer; I and my mother returned a little later from the fields. As we came near the house, we heard in the reverend gentleman's upper room the tones of some person, of which at first we were unable to say whether it was crying or laughing, but which soon struck us to be moaning. The moment we entered the house, my sister came weeping down the steps to meet us, and hurriedly related to us, how a female, professedly an aunt, had just come to the parson, that he had taken her to his room, had given her to understand that he was going to bring her beer, had come down again under this pretence, fetched his razor, gone up again with it, then (as Magdalene had herself seen through the keyhole) drawn near to the female as she was sitting, clasped her round the neck, as if he would kiss her, but then pressed her head down towards the floor, and cut her throat with his razor (as Katherine subsequently corrected herself, "placed the razor to her throat").

"Whilst my sister was relating this to us upon the stairs, the moaning still continued, and we heard the words of the parson, "Repent! thou must die!" and thereupon wimpering: "Don't do that to me! leave me but my life! assuredly I will come to you no more for money." My mother and sister went immediately into the lower room, but I, out of curiosity, sprang up the stairs till I came before the parson's door, and there I saw clearly through the keyhole, that Riembauer sat

<sup>1</sup> This letter is a curiosity. It runs to the following effect: Habeo casum mihi propositum, quem tantummodo tu solvere potes. Vir quidam, quem tu bene nosis, debet alicui personæ 3000 florenorum circiter. Si conscientia tua vigilat, solve hoc debitum. Nisi intra quatuor hebdomadas respondeas, horrenda patefaciet ista persona. Hannibal ante portas!



or knelt upon a female figure stretched upon the floor and still struggling with her feet, and held her head and neck fast with both his hands. I saw the blood running out of her.

"I then hurried down into our common dwelling room, and told what I had seen to my sorrowing mother and sister, who were still uncertain whether they should not call for help. As I was then going into the entrance passage, the parson came down the stairs in his ordinary brown jacket and a white apron, his hands and apron full of blood, still holding the bloody razor in his right hand, which he laid upon the little chest standing in the passage, and then betook himself to my mother and sister in the chamber. He related to them, as I heard by listening at the door, that this female had had a child by him, that she was constantly plaguing him for money, that she had even now again demanded from 100 to 200 florins of him, with the threat, in case of nonpayment, of exposing him to his spiritual superiors. Since he knew not how so much money was to be procured, he had cut her throat in order to be rid of her. On hearing this I crept out of curiosity into Riembauer's room, and saw the person in question, who had been before the same summer in our house, swimming in her blood, without any sign of life, upon the floor, her neck cut through, her hair dishevelled, also her neckhandkerchief and corset somewhat torn. I shrieked and wept, and in my fright let fall the light which I had brought with me."

She then describes the manner in which Riembauer succeeded in persuading her mother and sister to aid him in hushing up the matter; and the precautions taken by him to conceal the body and remove all evidence of the deed. It is singular to observe how fate seems to have worked against him in this attempt. He buried the body in an adjoining shed or lumber-room, and washed the floors himself, first with cold and then with hot water, but the blood had sunk too deep into the wood, and he was obliged to use a plane which he borrowed from a neighbour for the purpose. The morning after the murder a dog brought a bloody shoe into the court, which was immediately recognised by Riembauer as that of the deceased, and thrown away. Fourteen days after, great complaints were made by some women employed in the lumber-room of the stench, and one of them entering in the dark stumbled over

something and fell. Before she could get a light Riembauer came up and locked the door. He subsequently stated that the object against which the woman stumbled was the foot of the dead body sticking up from the floor; and that the stench was occasioned by the putrefaction of the flesh. The same evening he took a quantity of sand and filled up the grave effectually.

Katherine then relates the deaths of her mother and sister, whose bodies she describes as having been swelled and spotted in an extraordinary manner, and details the various expedients made use of by Riembauer to seduce or terrify her into silence. On her leaving him, she says he told her, that he had already resolved on the reply to be made to the accusation, that he should lay the whole guilt on her deceased mother and sister.

This is the substance of the first formal declaration made by Katherine before the judge or magistrate of the district. Made as it was by a girl of seventeen against a clergyman of established character, and charging a crime which had been committed nearly six years before, considerable doubt was entertained as to the propriety of acting upon it. Fortunately, however, the house in which the affair took place had changed hands, and was no longer in possession of the murderer. Immediate measures were therefore taken for an examination of it. On turning up the floor of the loft the skeleton of a female was found, having teeth of an extraordinary beauty and whiteness, for which, it may be remembered, the murdered woman was remarkable. Many of the boards in the room formerly occupied by Riembauer were stained in many places seemingly with blood, and some appeared to have been clumsily and inartificially planed in particular places. A neighbour also bore witness to the lending of a plane about the time in question. Upon this evidence Riembauer was provisionally arrested, and examined. He showed no signs of surprise or confusion at the charge, but at once admitting his connection with Eichstädter, asserted (as he had threatened) that she had been murdered by the sister and mother of the informant, who had quarrelled with and set upon her during his temporary absence from the parsonage. He further alleged that they themselves had buried the body, he himself having no farther participated in their guilt than by consenting to be silent about it. That Magdalene, whose temper

was described by Riembauer himself as angelic, should ever have been moved to such an act, or that Eichstädter, a woman of remarkable strength, should have been overcome by two slight and weak women, one far advanced in years, was extremely improbable, whilst Katharine's narrative was clear and consistent throughout. The case, however, was not considered strong enough unless supported by the confession of the criminal, and he was accordingly remanded to prison. Here he remained four years, during which he underwent no less than ninety and nine formal examinations.<sup>1</sup> Finding all appeals to his reason and conscience vain, the examining magistrate resolved on one occasion to try the effect of an appeal to his imagination. An examination was ordered for All Souls' Day, 1813, the eighth anniversary of the crime. It began at four in the afternoon, and had for its peculiar object, as well to press his understanding with the load of proofs against him, as also to excite his mind more than ordinarily by relations and recollections. He remained as usual unmoved, and it was already midnight, when the magistrate, after once again impressively appealing to his heart, suddenly lifted up a cloth, under which lay a death's head upon a pillow. "This," said the magistrate, "is the skull of Maria Eichstädter, still plainly distinguishable by the jaws full of the finest teeth." Riembauer rose instantly from his seat, opened wide his eyes, stared at the judge, then smiled as was his wont, stepped suddenly about three paces on one side to avoid seeing the threatening eyeholes of the skull, but recomposed himself and said, twice pointing to it from the side, "My conscience is at rest; this death's head here, if it could speak, would say, Riembauer is my friend, he was not my murderer," &c. &c. Again, notwithstanding this demeanour, the magistrate led him up to the skull and held it before his eyes. The accused betrayed some inward conflict at the sight, but retained his hypocritical tone, and again said solemnly to the skull, "Oh, if thou couldst speak, then wouldst thou confirm my truth."

Experiments of this kind appear to us to be wholly unjustifiable under any circumstances.

<sup>1</sup> The acts, examinations, and documents in this case were thus swelled to forty-eight folio volumes. Count Pecchio (*Observations of an Exile*) mentions a case of assassination in Italy, in which the examinations, &c. filled thirty volumes of 300 pages each.

The longed-for confession came at last, though rather singularly induced. A Jew, on his way to be executed for murder, was seen by Riembauer from his prison. The firmness with which the man advanced to meet his fate having elicited an expression of wonder from Riembauer, he was told that from the moment the Jew had made a clean breast by confession, a perfectly tranquil and composed state of mind had come upon him and never left him since. From the time this was related to Riembauer he became more and more restless, and he at length requested another examination before the judge. In this (the hundredth) he began by complaining of the wrongs he was suffering, and the wretched state of mind produced by them, and for a long time stuck to his old story; but at last being pressed by the examining magistrate, he exclaimed, "Yes! I feel myself touched in my inmost soul, I feel that my health is wearing away daily; and you, Mr. Commissioner, are right in saying that I cannot do better than make a penitent confession. But before I come to this decisive step, I beg above all the protection of the government for my innocent children and my last cook Anna Wenniger. And now take my sincere confession: Katharine has spoken what is not true in many particulars, but in the principal point, the truth; for it was I who deprived Anna Eichstädter of life."

It took thirteen more hearings to bring the whole story to light, during which he made several more attempts at prevarication. His confession agrees in the main with Katharine's narrative, with the exception of two or three striking and characteristic particulars. He says, that after he had cut the throat of his victim, she stood three or four minutes wholly unsupported, and he said to her, "I beg pardon of thee and God! thou wouldst have it so. Pray to God to pardon thy sins, and I will give thee absolution." "I gave it her (says he) in this *casu necessitatis*. She now began to sink, as if her knees would break; I took her behind under both arms and let her softly down upon the ground, that she might not fall. As she lay upon the ground I gave her ghostly comfort for a few minutes, and she began to struggle with her feet, till her last life-breath was flown." He seemed by a strange sort of casuistry to have argued himself into the belief, that

as Eichstädter's death was necessary to the support of his character, and the character of the whole body of the clergy might suffer with his, he was justified in killing her; and even in some of his later confessions he holds fast by this sophistical and very common-place argument. He also justified the irregularities of his prior life on the ground that no public scandal had been created by them. He denied to the last that he had any hand in causing or accelerating the deaths of Magdalene Frauenknecht and her mother, and on subsequent inquiry it appeared doubtful whether they had not really died suddenly of a fever prevalent in their neighbourhood at the time.

The final sentence was, "that F. S. Riembauer be declared guilty of the crime of murder, and punished with the *Festungstrafe* (hard labour and confinement) of the first class." It seems that the punishment of death was not applied on account of the insufficiency of the proofs, independent of the confession, to convict.

### H.

[We are sorry to announce the death of the author of this compilation; M. Feuerbach died at Frankfort a few months ago. We shall endeavour to collect a few particulars relating to him for our next Number. A short well-written memoir has already appeared in the *Annalen der Deutschen und Ausländischen Criminal-Rechts-Pflege*, from the pen of the editor, Dr. Hitzig, who knew Feuerbach well, and, like his distinguished friend, has been eminently successful in the union of legal with literary pursuits. Feuerbach's last work, we believe, was the well-known History or Mystery of Gaspar Häuser, which is now in a fair way of elucidation. It seems that Gaspar Häuser was the product of an illicit amour; that a priest, the reputed father, took charge of the child from the moment of its birth, and finally inclosed it in a subterraneous hole or vault in a convent where he was residing; that thus imprisoned and shut out from all human intercourse, the unhappy being passed his existence until within a day or two of his being found as related in the tale, when the priest, being compelled to quit the convent, and having no other place of concealment at hand, released and left the boy to his fate. The chain of circumstantial evidence by which thus much of the story has been made out, is so well put together as to leave little doubt that the true elucidation has been hit upon. The above outline was communicated to the writer in conversation a few weeks ago by M. Klüber, the celebrated writer on Public Law, who first discovered and is still following the clue. When he has thoroughly sifted the matter, he will probably favour the public with a memoir on the subject. None of the explanatory particulars have yet appeared in print.]

# DIGEST OF CASES.

## COMMON LAW.

[Comprising 4 Bayn. & Adol. Part 1 ; 9 Bing. Part 6, and 10 Bing. Part 1 ; 1 Crompt. and Meeson, Part 3 ; 3 Tyrwhitt, Part 1 ; 2 Moore and Scott, Part 4 ; Moody's Crown Cases Reserved, Part 3. All cases included in former Digests being omitted.]

### ACTION ON THE CASE.

An action on the case may be maintained for an injury, not wilful, occasioned by the defendant's negligence, though it be an immediate injury. (4 B. & C. 223.)—*Williams v. Holland*, 10 Bing. 112.

And see DISTRESS, 1, 3.

### AFFIDAVIT.

1. It is not sufficient in an affidavit by the defendant in a cause to describe him merely as "A. B. the above-named defendant," without any other addition. (Reg. H. T. 2 W. 4, pl. 5.)—*Lawson v. Case*, 1 C. & M. 481.
2. Affidavits sworn after the time mentioned in a rule may be used in showing cause.—*Percival v. Hodley*, 3 Tyr. 217, n.

### AMENDMENT.

A declaration on a bill of exchange stated the bill to have been drawn by A. payable to his order; on production of the bill it appeared to be payable to the order of another person: Held, that this was a variance properly amendable under 9 Geo. 4, c. 15. And quære, whether the Court in banc has authority to revise the opinion of the judge at nisi prius as to amendments under that act. (But see now 3 & 4 W. 4, c. 42, s. 23, 24, in the Abstract of Statutes, *post*.)—*Parks v. Edge*, 1 C. & M. 429.

And see PROCESS, 1.

ANNUITY. See LIMITATIONS, STATUTE OF.

### ARBITRATION.

1. (*Setting aside award*.) The Court refused to set aside a barrister's award on the ground that he admitted an incompetent witness.—*Perriman v. Steggall*, 9 Bing. 679.

2. The agreement of reference stated that the arbitrator "should or might" award a certain matter, with a *proviso*, &c.: Held, that these words were imperative on the arbitrator, and that he was bound to insert the proviso in his award, the contents of the agreement and the situation of the parties requiring such a construction.—*Crumph v. Adney*, 1 C. & M. 355.

### ARREST.

A sheriff's officer cannot justify his carrying the party arrested to a tavern without his express consent; his mere submission or acquiescence is not enough. Nor can he justify carrying the party to prison within 24 hours, unless he have required the latter to nominate some safe and convenient dwelling-house to which he may be taken, and he have refused to do so. And the beginning to carry, and not the arrival at the prison, is to be considered as the carrying to prison. (32 Geo. 2, c. 28.)—*Dewhurst v. Pearson*, 1 C. & M. 365.

And see MURDER, 2.

### ARSON.

1. An open building in a field, at a distance from and out of sight of the owner's house, though boarded round and covered in, is not an outhouse within 7 & 8 Geo. 4, c. 30, s. 2.—*Rex v. Ellison*, Moo. C. C. R. 336.
2. On an indictment for firing a stack, a mistake in the name of the place where the offence was committed is immaterial. On a statute making it capital to set fire to a stack of pulse, it is sufficient to state that the prisoner set fire to a stack of beans: the judges will take notice that beans are pulse.—*Rex v. Woodward*, Moo. C. C. R. 323.

### ATTORNEY.

1. (*Costs of taxation of bill.*) In an action on an attorney's bill, an order was obtained for taxing the bill, on an undertaking to pay the amount taxed, with costs in the action. More than a sixth of the bill having been struck off, the Court disallowed the costs of taxation.—*Featherstonhaugh v. Reen*, 1 C. & M. 495.
2. (*Costs of taxation of bill.—Retainer.*) On a general reference to taxation of an attorney's bill, the officer cannot take into his consideration the question of retainer.—*Nelson v. Slack*, 2 Moo. & S. 820.

### AUCTION.

Where several lots are knocked down to a bidder, and his name marked against them in the catalogue, a distinct contract arises for each lot, and though the aggregate exceed £20 in value, no single lot being of that value, a memorandum signed afterwards by the bidder that he agrees to become the buyer of the several lots set against his name, does not require a stamp.—*Roots v. Lord Dormer*, 4 B. & Ad. 77.

### BAIL.

1. A bail-bond given by a party attached for contempt in not putting in an answer in Chancery, is not assignable under the statute 4 Anne, c. 16, s. 20.—*Meller v. Palfreyman*, 4 B. & Ad. 146.



2. (*Giving time.*) After a bail-bond has been forfeited, and an assignment of it taken, time given to the principal is no discharge of the sureties.—*Woosnam v. Price*, 1 C. & M. 352.
3. (*Informality of notice.*) An informality in the notice of bail does not render the proceeding a nullity, so as to justify the issuing of an attachment against the sheriff.—*Rex v. Sheriff of Middlesex*, 1 C. & M. 482.
4. (*Time to put in bail.*) Defendant was arrested on the 1st April. Easter Monday and Tuesday were the 8th and 9th. On the 10th the plaintiff took an assignment of the bail-bond, and sued out process against the bail. The Court set aside the writ.—*Alston v. Underhill*, 1 C. & M. 492.
5. (*Render by sheriff.*) Where the sheriff has put in bail above in order to render, and has obtained a judge's order for rendering at the instance of himself and his bail, that order will not be rescinded, though it might be amended by striking out all which showed it to be granted at the sheriff's instance.—*Green v. Jacobs*, 3 Tyr. 231.

#### BANKRUPTCY.

1. (*Reply to plea of bankruptcy.*) It is a good answer to a plea of bankruptcy that the certificate was obtained by fraud, although the enactment to that effect in 5 Geo. 2, c. 30, s. 7, is not repeated in 6 Geo. 4, c. 16.—*Horn v. Ion*, 4 B. & Ad. 78.
2. The statute 1 Wm. 4, c. 7, s. 7, which exempts judgments on cognovit, and by default, confession, and *nil dicit*, in any action commenced adversely and without collusion, from the operation of the 6 Geo. 4, c. 16, s. 108, does not extend to judgments on warrants of attorney, though given without collusion or intention of fraudulent preference. Therefore a sheriff who, having seized and sold goods under such a judgment, pays over the proceeds after notice of an act of bankruptcy by the defendant, is liable to the assignees for money had and received.—*Crosfield v. Stanley*, 4 B. & Ad. 87.
3. (*Action against assignee under void commission.*) A party against whom a void commission of bankruptcy has issued, may sue the official assignee for money received by him in that character.—*Munk v. Clarke*, 10 Bing. 102.

#### BILL OF EXCHANGE.

1. (*Proof of consideration, when thrown on plaintiff.*) Indorsee against indorser for accommodation of the drawer. The drawer proved that he had got the bill discounted on usurious terms by the plaintiff's father in law: Held insufficient to throw upon plaintiff the onus of proving consideration, without proof that the father-in-law was his agent.—*Bassett v. Dodgin*, 10 Bing. 40.
2. (*Declaration.—Acceptance.*) In a declaration by indorsee against indorser, it is not necessary to allege a special acceptance at a particular place, or a presentment there: it is sufficient to allege a general presentment to the drawee, without stating any acceptance, and to prove the pre-

sentment at the particular place pointed out by the acceptance.—*Parks v. Edge*, 1 C. & M. 429.

3. (*Notice of dishonour.*) S. and Co., owners of a ship of which H. was captain, despatched him to Miramichi with instructions to purchase a cargo of timber, and draw on them for the amount. H. proceeded there accordingly, and purchased timber for 154*l.* and drew on S. and Co. for the amount at sixty days' sight, in favour of the seller or his order. The bill, dated 4th September 1826, was presented 21st November for acceptance, and protested for nonacceptance. H. was in Liverpool, with the ship under his command, from October 1826, to April 1827. In 1832, he was arrested on the bill at Miramichi, and paid it to release himself, and sued S. and Co. in a special action of assumpsit for not accepting and paying the bill, and not indemnifying him from the consequences of drawing it. It did not appear that H. had received any notice of the dishonour of the bill: Held, that that circumstance furnished no ground of defence: Held, also, that the statute of limitations did not begin to run until the plaintiff's arrest in 1832, since he was not damnified till then; and the promise to indemnify, not that to accept or pay, was the promise which the law would imply in favour of the plaintiff. (3 B. & A. 288, 626; 5 B. & C. 259; Cro. Eliz. 123; 1 B. & Ad. 415.)—*Huntley v. Sanderson*, 1 C. & M. 467.

And see AMENDMENT.

#### BOND.

1. (*How far governed by recital.*) A bond taken in the penal sum of 1000*l.* cannot be reduced to 500*l.* by a recital in the condition that the parties had agreed to execute a bond in the sum of 500*l.*—(*Ingleby v. Swift*, 10 Bing. 84.)
2. (*Assignment of breaches on.*) A bond was executed March 17th, 1827, conditioned for payment of 5000*l.* on March 17th 1829, with interest in the meantime, pursuant to the stipulations of an indenture of even date. In an action brought on the bond after the latter day: Held, that breaches could not be assigned. (2 B. Moore, 220.)—*Smith v. Bond*, 10 Bing. 125.

And see EVIDENCE, 4.

#### BUILDING.

- (*What is, in watching and lighting act.*) A watching and lighting act imposed a rate on all houses, &c. &c. sheds, &c. and other buildings: Held, that sheds which were erected to protect engines for the convenient working of a mine, were rateable. It was contended that they were exempt, as being merely accessorial to the engines.—*Brown v. Lord Granville*, 10 Bing. 69.

#### BURGLARY AND HOUSEBREAKING.

1. A room in a dwelling-house, occupied therewith, and under the same roof, though it has a separate outer door, and no internal communication with the rest of the house, is to be deemed part of the dwelling-house.—*Reg. v. Burrows*, Moo. C. C. R. 274.

2. Lifting the flap of a cellar usually kept down by its own weight, is a breaking.—*Rex v. Russell*, Moo. C. C. R. 377.
3. Removing the fastening of a window by the hand introduced through a broken pane, and thereby opening the window and entering, is a breaking.—*Rex v. Robinson*, Moo. C. C. R. 327.

#### COMMITMENT.

A warrant of commitment under 5 Geo. 4, c. 18, s. 2, of a party for non-payment of a penalty, there not being a sufficient distress whereon to levy it, must be in writing; and the party cannot lawfully be detained without a written warrant longer than the time necessary for making it out.—*Hutchinson v. Lowndes*, 4 B. & Ad. 118.

#### CONDITION PRECEDENT.

The defendant agreed to pay for building work, on receiving an architect's certificate that it was done to his satisfaction. The architect checked the builder's charges, and sent them to the defendant:—Held, that this was not such a certificate of satisfaction as enabled the builder to sue defendant, though he had not objected to pay on the ground of not having received a sufficient certificate.—*Morgan v. Birnie*, 9 Bing. 672.

#### COPYHOLD.

(*Devise of, under power.*) Copyhold premises were surrendered at a Court Baron to A. for life, and after his decease to the use of such person and for such estate as A. should appoint by will attested by *three* witnesses; and in default of *such* appointment to the use of A. in fee. A. was admitted, and afterwards, by will attested by *two* witnesses, devised to B., and died without making any other will or surrender: Held, that the will, though not a good execution of the power, operated on the reversion vested in him in default of appointment; and that the want of a surrender to the use of the will was cured by 55 Geo. 3, c. 192.—*Doe d. Hickman v. Hickman*, 4 B. & Ad. 56.

#### COPYRIGHT.

On an action by several plaintiffs for pirating the copyright of a work, it appeared that defendant published it pursuant to the terms of a cognovit given by him to one of the plaintiffs and another bookseller, in an action for not performing a contract to write the work in question; Held a sufficient defence.—*Sweet v. Archbold*, 10 Bing. 133.

#### CORPORATION.

1. (*Incompatibility of several offices.*) The acceptance by a person holding a corporate office of another incompatible office not corporate, does not operate as an absolute avoidance of the former, though it may be ground of amotion; nor does acceptance of an incompatible office operate as an absolute avoidance of a former office, in any case in which the party could not divest himself of that office by his own act, and without the concurrence of some other authority to his resignation or amotion, unless that authority were privy and consenting to the second appointment. (1 Burr.

245; Sir W. Jones, 293; Sid. 14; Popham, 133; 1 Ld. Raym. 563; 2 Ld. Raym. 1304.)—*The King v. Patteson*, 4 B. & Ad. 9.

2. In quo warranto for usurping the office of alderman and justice of peace of Norwich, the plea set out a charter of Charles II., granting that all the aldermen who had borne the office of mayor, so long as they should continue in their offices, should be justices of the peace for the city; and stated that defendant was duly elected an alderman, and still was alderman; and that he became mayor, and thereby afterwards became justice. Replication, that defendant, being such alderman and justice, was duly appointed treasurer of the county of the city of Norwich, and gave the requisite security, and accepted and took on himself the office of treasurer, and entered on the discharge of the duty of that office; which offices, of alderman and justice, and of treasurer, were incompatible, whereby defendant vacated the offices of justice and alderman, &c. Rejoinder, that defendant did not give such security: Held bad on demurrer, as tendering an immaterial issue: Held, also, that defendant, so long as he was alderman and justice, was not a person capable of being appointed county treasurer.—S. C.

And see OFFICE.

#### COSTS.

1. (*Of immaterial issues.*) Where immaterial issues are found for defendant, and judgment is afterwards entered for plaintiff *non obstante veredicto*, neither party is entitled to the costs of the immaterial issues.—*Goodburne v. Bowman*, 9 Bing. 687.
2. (*Of several defendants severing in pleading.*) Some of many defendants demurred to several counts of the declaration, (for libel,) and pleaded not guilty to the rest; the other defendants pleaded not guilty to the whole. The defendants who demurred obtained judgment: Held, that they could not at once tax their costs upon that judgment. (Reg. Hilary Term, 2 Wm. 4, c. 74.)—*Forbes v. Gregory*, 1 C. & M. 435.
3. (*Under 43 Geo. 3, c. 46.*)—A vendor arrested his vendee for the full amount of goods sold and delivered, though part had been sent on approval, returned to the vendor, and accepted by his servant; but it did not appear that the vendor had personal notice of such return and acceptance: Held, that defendant was not entitled to costs under 43 Geo. 3, c. 46.—*Raper v. Sheasby*, 1 C. & M. 496.

And see COURTS OF REQUESTS ACTS; EXECUTOR AND ADMINISTRATOR, 1; ATTORNEY, 1, 2.

#### COUNTY TREASURER.

The statute 12 Geo. 2, c. 29, ss. 6 and 7, enacts that the respective high constables shall pay the monies received by them in respect of the county rate, to such person as the justices in quarter-sessions shall appoint to be the treasurer, he first giving security, to be approved by the justices in sessions, to be accountable for the money received by him in pursuance of the act, and for which he is made accountable to the justices: Held,

that the giving of such security was not made a condition precedent to a person's becoming treasurer, or being responsible to the justices, but that the appointment was complete without the giving of such security.—*The King v. Pattenon*, 4 B. & Ad. 9.

#### COURT OF ERROR.

Error lies to K. B. on a judgment of C. P. for error in fact. And though error in fact only be assigned, if there be error in law apparent on the face of the record, the judgment will be reversed. (Yelv. 58; 1 Burr. 410; 4 East, 502; 5 East, 271; Plowd. 66; Comyns, 597.)—*Castledine v. Mundy*, 4 B. & Ad. 90.

#### COURTS OF REQUESTS ACTS.

The debt, originally above £5, was reduced below that sum at the trial, in consequence of plaintiff's failing to prove the rest through the absence of a witness: Held, that defendant was entitled to costs under the Blackheath Court of Requests Act, which deprived the plaintiff of costs where he recovered less than £5.—*More v. Jones*, 3 Tyr. 151.

#### DEVISE.

1. Testator, premising that if his daughter should die unmarried, he would not have his estate sold or frittered away after her death, or left to any body who would not reside on it, but that it should be entailed, and residence made the absolute groundwork of the entail,—devised all his real estate to trustees and their heirs, in trust to permit his daughter to receive the rents and profits to her own use, or to sell or mortgage any part, and also to settle the same or any part on any husband for life, he being liable to impeachment for waste or non-residence. But if his daughter should have a child, he devised it to the use of such child, from and after his daughter's decease, with a reasonable maintenance for such child's education in the mean time. Should none of these cases happen, he devised the estate after his daughter's decease to trustees to preserve contingent remainders, for the use of his nephew on condition of residence, with other remainders over. Testator also gave his daughter power, in case of misconduct in any of the remainder-men, to set him aside by her will; and added, "I recommend it to my daughter, for want of issue to herself, not to leave in legacies above £600, and that out of my charge on N., and entail the rest for the further support of this house:" Held, that the word *child* was *nomen collectivum*; that the daughter took an estate tail; that the estate during her life and after her death were of the same quality, and a recovery suffered by her after the testator's death was therefore valid. (1 Ventr. 231; Moore, 682; 1 Atk. 433; 2 B. & C. 520.)—*Doe d. Jones v. Davies*, 4 B. & Ad. 48.
2. (*What passes lands in mortgage to the devisor.*) Devise of messuages, buildings, chattels real, money and securities for money, debts owing, and personal estate, to trustees and their heirs, in trust to pay the rents and profits to A. for life, and after his death to divide the same, or transfer the securities, unto and among A.'s children: Held to pass lands vested in the devisor as mortgagee.—*Mather v. Thomas*, 10 Bing. 44.

And see COPYHOLD.

## DISTRESS.

1. (*By overseers for poor-rate.*) Case against overseers for wrongfully and maliciously taking the goods of the plaintiff of the value of 700*l.* as a distress for 141*l.* alleged and pretended to be due for a poor-rate, whereby they levied an *unreasonable and excessive* distress for the said 141*l.*; and it was proved that defendants, having a regular distress warrant for the rate, distrained cattle, &c. of the plaintiff, to the value of more than 600*l.*: Held, on motion in arrest of judgment, that the declaration in *case* (not *trespass*) was sufficient after verdict, though it did not expressly admit *any* poor-rate to be due: Held also, that it was a question for the jury on these facts, whether defendants acted maliciously or not: Held, further, that plaintiff was not bound to demand a copy of the warrant according to 24 G. 2, c. 44, s. 6, before commencing his action, inasmuch as the overseers had not acted in obedience to the warrant, and no action would have lain against the justices. (1 B. & C. 145; 2 M. & S. 259; 5 East, 238; 2 B. & P. 158.)—*Sturch v. Clarke*, 4 B. & Ad. 113.
2. (*Implement of trade, when privileged.*) An implement of trade is privileged from distress only when in actual use, and when there is no other distress on the premises. (1 C. & J. 484.)—*Fenton v. Logan*, 9 Bing. 676.
3. *Case*, as well as *trespass*, lies for an excessive distress after tender of the rent due. (1 B. & C. 145; 11 East, 395.)—*Holland v. Bird*, 9 Bing. 15.
4. Goods sent to an auctioneer to be sold on premises occupied by him are privileged from distress for rent. (3 B. & B. 75.)—*Adams v. Grane*, 1 C. & M. 380.

## DOWER.

(*In the manor of Cheltenham.*) It was determined that under the stat. 1 Car. 1, for settling the customs of the manor of Cheltenham, the widow of a copyholder is entitled to dower out of customary lands of which her husband was tenant during the coverture, but of which he did not die tenant, such lands having been aliened during the coverture by the husband alone, without the wife's having been examined in Court or joined in the surtender.—*Riddle v. Jenner*, 10 Bing. 29.

## EJECTMENT.

(*Service on joint tenant.*) Service of declaration in ejectment on one of two joint tenants in possession is sufficient, if the joint tenancy appear on the affidavit of service.—*Doe v. Gaskell v. Roe*, 3 Tyrw. 84.

## EMBEZZLEMENT.

1. If the property embezzled has been in the possession of the master, or any of his other servants, the case is not within the 7 & 8 G. 4, c. 29, s. 47.—*Rex v. Murray*, Moo. C. C. R. 276.
2. Embezzlement of money by a servant not authorised to receive it is not within the statute.—*Rex v. Morley*, Moo. C. C. R. 343.
3. But it is sufficient if he were employed to receive in a single instance only; he need not have been a general servant. (*Rex v. Nettleton*, Ry. & M. 259.)—*Rex v. Hughes*, Moo. C. C. R. 370.

## ESTREATS.

The Court of Exchequer has no jurisdiction over estreats not returned to it; e. g., over estreats of recognizances to try a traverse at the quarter-sessions. The sessions only have jurisdiction to relieve. *Rex v. Thompson*, 3 Tyrw. 53.

## EVIDENCE.

1. (*Entries by deceased executor.*) Entries of receipt of rent by a deceased executor, who received and accounted for it in that capacity, and under whom the plaintiff claims, are evidence for the plaintiff.—*Spiers v. Morris*, 9 Bing. 687.
2. (*Copy of warrant of attorney.*) The copy of a warrant of attorney, with the affidavit, filed pursuant to 3 G. 4, c. 39, is good evidence of the original, as against the party filing it, without proof of collation.—*Sylvester v. Anthony*, 9 Bing. 746.
3. (*Proceedings in Equity.*) The order for an attachment for non-payment of costs of a suit in equity is in itself *prima facie* evidence that a suit had been pending. *Semble*, also, that a decree in equity is admissible in evidence, though it do not recite the bill and answer, and no proof be given of them.—*Blower v. Hollis*, 1 C. & M. 893.
4. (*Indorsement on bond.*) In debt on bond more than 20 years old, the obligee's executors, to rebut the presumption of payment, gave evidence of payments of interest by the obligor to A. B. equal in amount to the interest that would be due upon the bond: Held, that an indorsement on the bond in the obligee's handwriting, and which appeared to have been made about the time of the execution of the bond, stating that it was given in trust for A. B., was evidence to connect the payments of interest with the bond, although it was not proved to have been seen by the obligor. (7 East, 279, 290; 2 Str. 826; 15 East, 33; 10 East, 109; 10 B. & C. 317.)—*Gleadow v. Atkin*, 1 C. & M. 410.
5. (*Prisoner's examination.*) Parol evidence may be given to add to the examination of a prisoner taken before a magistrate. (Ry. & M. 231.)—*Rex v. Harris*, Moo. C. C. R. 338.

And see HUSBAND AND WIFE, 1; PRINCIPAL AND ACCESSORY, 2; PRESUMPTION.

## EXECUTOR AND ADMINISTRATOR.

1. (*To what costs liable in case of wilful negligence.*) An executor plaintiff who has been guilty of wilful negligence is not liable, after judgment as in case of a nonsuit, to the costs of the cause, but only to the costs occasioned by such negligence to the defendant.—*Woolley v. Sloper*, 9 Bing. 754.
2. Executors continued to carry on the testator's business, and drew bills, as *executors*, for goods sold to defendants, of which defendants accepted several: Held, that plaintiffs might sue as executors for the price of such goods. (1 T. R. 487; 9 B. & C. 669.)—*Aspinall v. Wake*, 10 Bing. 51.
3. (*Liability of, for compounding debts.*)—An administrator sued a debtor of



the intestate, and recovered a verdict; the debtor subsequently petitioned for his discharge from prison under the Insolvent Act, and he offered terms, according to which he was to be liberated on payment of a sum of money less than the costs incurred in the action. To these terms the administrator agreed, and liberated the debtor: Held that he was not liable to a creditor of the intestate for any part of the debt as assets.—*Pennington v. Healey*, 1 C. & M. 402.

### EXECUTORY DEVISE.

A limitation by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of 21 years as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person, is a valid limitation. *Secus*, if to the term in gross of 21 years be added the number of months equal to the period of gestation. (In the Lords.)—*Cadell v. Palmer*, 10 Bing. 140.

### FELO DE SE.

If a woman takes poison with intent to procure a miscarriage, and dies of it, she is guilty of self-murder, whether she was quick with child or not; and a person who furnished her with the poison for that purpose will, if absent when she took it, be an accessory only.—*Rex v. Russell*, Moo. C. C. R. 356.

And see PRINCIPAL AND ACCESSORY, 4.

### FORGERY.

1. The 7 G. 2, c. 22, s. 1, was not repealed by the 45 G. 3, c. 89, s. 1; and after the latter statute, uttering a forged acceptance continued punishable under the former.—*Rex v. Mather*, Moo. C. C. R. 291.
2. If several persons make distinct parts of a forged instrument, though none of them knows by whom the other parts are executed, each is a principal.—*Rex v. Kirkwood*, Moo. C. C. R. 304. *Rex v. Dade*, ib. 307.
3. Uttering in England a forged note payable in Ireland only, was within the forgery acts prior to 11 G. 4 & 1 W. 4, c. 66.—*Rex v. Kirkwood*, Moo. C. C. R. 311.
4. (*Forged request.*) A request under 11 G. 4 & 1 W. 4, c. 66, s. 10, must import on the face of it to be a request; and if the words have not of themselves that effect, but are, so understood in trade, there must be an innuendo to explain them.—*Rex v. Cullen*, Moo. C. C. R. 300.
5. Such a request need not be addressed to any one. *Ibid.*—*Rex v. Carney*, Moo. C. C. R. 351.

### FRAUDS, STATUTE OF.

The defendant employed the plaintiff to construct a waggon, and while it was unfinished in the plaintiff's yard, employed another person to fix on the iron work, &c.: Held, that this did not constitute an acceptance under s. 17 of the Statute of Frauds. (2 B. & C. 44, 511.)—*Maberly v. Sheppard*, 10 Bing. 99.

## FRAUDULENT CONVEYANCE.

(*Who are parties grieved by — Forfeiture.*) Assignees of an insolvent debtor are "parties grieved," within 13 Eliz. c. 5, by a fraudulent conveyance by the insolvent, and may recover the penalty thereby given against the parties to the fraud. On a fraudulent alienation of lands, the offenders forfeit, by 13 Eliz. c. 3, a year's value of the land, but not the consideration money named in the conveyance.—*Butcher v. Harrison*, 4 B. & Ad. 129.

## HIGHWAY ACTS.

(*Justification under general issue in trespass against surveyor.*) In trespass against surveyors of the highways for pulling down a watchhouse, the act 13 Geo. 3, c. 78, s. 82, does not enable them, under a plea of not guilty, to justify the removing it as being a nuisance on the highway.—*Witham Navigation Company v. Padley*, 4 B. & Ad. 69.

## HUSBAND AND WIFE.

1. The wife of one of several prisoners is inadmissible as a witness.—*Rex v. Hood*, Moo. C. C. R. 281.—*Rex v. Smith*, *ib.* 289.
2. A wife cannot be convicted of stealing property of which her husband is a part owner.—*Rex v. Willis*, Moo. C. C. R. 375.

## ILLEGAL CONTRACT.

(*Action by party to.*) Plaintiff and defendant were engaged together in the conduct of an unlicensed theatre; plaintiff, at defendant's request, paid money to persons employed in the theatre, and for dresses, &c. to be used there: Held, that he could not recover it back. (1 M. & S. 596.)—*De Begnis v. Armitstead*, 10 Bing. 107.

## INDICTMENT.

1. (*Joinder.*) The officers ought not to join in the same indictment counts charging prisoners as principals in stealing, and also as receivers. (*Rex v. Galloway*, R. & M. 234.)—*Rex v. Madden*, Moo. C. C. R. 277.
2. (*Allegation of time.*) Where a statute makes an offence committed after a given day triable in the county where the party is apprehended, and authorises the laying it as if committed in that county, and does not vary the nature and character of the offence, it is no objection that the day laid in the indictment is before the day named in the statute, if the offence were in fact committed after that day.—*Rex v. Treharne*, Moo. C. C. R. 298.
3. (*Description of person.*) Adding, in an indictment, a false description to the name of a person who must be named, is fatal, though it be not necessary to give any description. As, in bigamy, if the indictment describe the woman as a widow, and it appear in evidence that she was a single woman.—*Rex v. Deeley*, Moo. C. C. R. 803.
4. (*Omission of contra formam statuti.*) Notwithstanding 7 Geo. 4, c. 64, s. 20, the omission of "against the form of the statute," &c. is fatal in an indictment which would but for a statute be no offence.—*Rex v. Pearson*, Moo. C. C. R. 313.

5. (*Description of house.*) A house, the joint property of partners in trade, and in which their business is carried on, may be described as the dwelling-house of all the partners, though one of them only reside in it.—*Rex v. Athea*, Moo. C. C. R. 329.
6. (*Conclusion of *contrá pacem*.*) A bad conclusion of *contrá pacem* is no *contrá pacem*, and is cured by 7 Geo. 4, c. 64, s. 20.—*Rex v. Chalmers*, Moo. C. C. R. 352.
7. (*Description of house.*) A house may be described as in the possession of the actual occupier, though his possession be wrongful.—*Rex v. Wallis*, Moo. C. C. R. 344.
8. (*Allegation of place.*) It is no objection on plea of not guilty, that there is no such place in the county as that in which the offence is alleged to have been committed.—*Rex v. Woodward*, Moo. C. C. R. 323.

And see ARSON, 2; WOUNDING, 3.

#### INSOLVENT DEBTORS' ACTS.

1. (*Discharge under, how pleadable.*) A discharge under the insolvent debtors' act cannot be given in evidence under the general issue; it must be pleaded. (2 Wils. 332; Willes, 99.)—*Bircham v. Creighton*, 10 Bing. 11.
2. (*Proof of proceedings. Sale of insolvent's estate.*) Insolvent proceedings, though commenced under the 1 Geo. 4, c. 119, may be proved according to the mode prescribed by 7 Geo. 4, c. 57.—The provisions in the seventh section of the latter act as to the mode of conducting the sale of the insolvent's estate are directory only.—*Doe d. Phillips v. Evans*, 1 C. & M. 450.
3. (*What a voluntary payment.*) A creditor, on the 10th September, wrote to his debtor in the following terms:—"I must have the money in a few weeks; and if you do not send it, I shall put it into the hands of an attorney to get." In the beginning of October the debtor, in consequence of this letter, paid the debt, being then insolvent. On the 21st November, he petitioned the Insolvent Debtors' Court for his discharge: Held, that the payment was not a *voluntary* one within the 7 Geo. 4, c. 57, s. 32.—*Reynard v. Robinson*, 9 Bing. 717.

And see FRAUDULENT CONVEYANCE; SHERIFF, 1.

#### INSURANCE.

- (*Broker's liability.*) An insurance broker effected insurances on goods for a principal, who, putting into his hands a letter from the supercargo of the vessel in which they were shipped, told the broker the policies must be altered, and he must do the needful. In an action against the broker for negligence in this matter, it was held that he might call brokers to say whether, looking at the policies, the invoices, and the letter, the alterations were such as a skilful broker ought to have made. (2 Stark. N. R. C. 258; 10 B. & C. 527.)—*Chapman v. Walton*, 10 Bing. 57.

## INTERPLEADER ACT.

1. The Court will not interfere in favour of the sheriff unless a claim be actually made to the property.—*Isaac v. Spilsbury*, 10 Bing. 3.
2. (*Adverse claimant barred on non-appearance.*) Where the sheriff had taken goods in execution, and on an adverse claim being made to them; obtained a rule under 1 & 2 Wm. 4, c. 58, to which the claimant did not appear, the Court barred the claim, and ordered the claimant to pay the execution creditor his costs of showing cause, unless cause was shown in six days from the service of such order.—*Perkins v. Benton*, 3 Tyrw. 51.
3. A sheriff who has paid over the proceeds to the execution creditor, is too late to apply for relief under the statute.—*Chalon v. Andersen*, 3 Tyrw. 237.

## JUDGMENT.

(*In criminal case, amendment of.*) By 11 Geo. 4, and 1 Wm. 4, c. 70, s. 9, judgment may be pronounced at the assizes on trials for felony or misdemeanour on a King's Bench record, and shall have the effect of a judgment in the Court above, unless that Court in the first six days of term grant a rule for a new trial, or for amending the judgment. A defendant who has been sentenced at the assizes, cannot apply to the Court to amend the judgment by *diminishing the punishment*, without showing, besides the ordinary affidavits in mitigation, some specific defect in the sentence, or some matter which could not have been adduced at the assizes.—*Rex v. Lloyd*, 4 B. & Ad. 135.

JURY. See QUAKER.

## LARCENY.

1. (*Committed abroad.*) If a larceny be committed out of the kingdom, though within the king's dominions, bringing the goods stolen into this kingdom will not make it larceny here.—*Rex v. Prowes*, Moo. C. C. R. 349.
2. (*By servant.*) If a man hired to drive cattle sell them, it is larceny, for he has only the custody, not the right of possession, though he be a general drover, and paid by the day.—*Rex v. M'Namee*, Moo. C. C. R. 368.

## LIMITATIONS, Statute of.

1. (*When it runs against the grantor of an annuity.*) An annuity granted more than six years back, but upon which the grantor had made payments within the six years, was avoided at his instance. In an action afterwards brought by his executors to recover back the consideration money, and plea of the Statute of Limitations, it was held that the statute did not begin to run till the avoidance of the annuity. (1 Esp. 309; 3 Taunt. 56; 6 B. & C. 651.)—*Cowper v. Godmond*, 9 Bing. 748.
2. (*Acknowledgment.*) Held, that a letter, in which the defendant stated that the claim was one he was not prepared to admit to the full extent, and set forth circumstances impugning the correctness of part, and questioning it on the ground of its long date, was not a sufficient acknowledgment to take the case out of the statute, as not raising the implication of a promise

to pay. (8 Bing. 38; 7 Bing. 166; 6 B. & C. 602; 1 Bing. 266.)  
*Brigstock v. Smith*, 1 C. & M. 483.

And see BILL OF EXCHANGE, 3.

### MANSLAUGHTER.

(*By unskilful delivery of a woman.*) An ignorant and unskilful person, in delivering a woman, gave the child a mortal wound on the head, as soon as the head became visible, of which the child died immediately after the birth, being born alive: Held, that he was rightly convicted of manslaughter.—*Rex v. Senior*, Moo. C. C. R. 346.

### MASTER AND SERVANT.

Two partners, joint tenants of a house in which they carry on business, have a joint weekly servant; one of them gives a regular week's notice to quit: Held, that the other has nevertheless a right to authorise him to remain in the house.—*Donaldson v. Williams*, 1 C. & M. 345.

### MORTGAGE.

(*Of turnpike tolls, legal estate given by.*) By a local turnpike act certain tolls were made subject to the payment of monies borrowed and to be borrowed upon them. The trustees granted mortgages of such tolls in the form given by the general turnpike acts, conveying to each creditor such proportion of the tolls, and the toll-gates and toll-houses, as the money advanced by him bore to the whole sum due on his security. A subsequent act continuing the former, and granting new tolls to be applied like the former, and to be subject to the debts incurred on the credit of the former tolls, provided that all monies due on such credit were to have a "priority of charge and payment" before any monies advanced under the second act. On ejectment for the tolls and toll-houses by the holder of a mortgage under the second act, it was held that the words "priority of charge" did not prevent this mortgagee from acquiring a legal estate in the subjects mortgaged, but only rendered him accountable to the other mortgagees for such portion of the tolls as they were entitled to in respect of their advances. (2 B. & P. 219.)—*Doe d. Thompson v. Lediard*, 4 B. & Ad. 137.

### MURDER.

1. If a keeper or other person lawfully authorised under 9 Geo. 4, c. 69, be killed in an attempt to apprehend parties offending against that act, the slayer will be guilty of murder, though the keeper had previously struck him, if he struck only in self-defence, and to diminish the violence illegally used against him, and not vindictively to punish.—*Rex v. Ball*, Moo. C. C. R. 330, 333.
2. An officer having a charge of felony against a man, but having no warrant, and the man having in fact done nothing rendering him liable to arrest, but knowing the other to be an officer,—attempts to arrest him without notifying to him that he has such a charge, and is killed by him: Held to be murder.—*Rex v. Woolmer*, Moo. C. C. R. 334.

3. An interference by a gamekeeper with persons found armed in the pursuit of game on the lands of an adjoining proprietor, without any attempt forcibly to apprehend them, is not such a provocation as to reduce the killing of him from murder to manslaughter.—*Rex v. Warner*, Moo. C. C. R. 380.

#### NOTICE OF ACTION.

(*To officers.*) A defendant who had entered a house in search of a party against whom he had a warrant signed by the commissioners of a court of requests, but who was not in the house, was held entitled under the Court of Requests' Act, 46 Geo. 3, c. 87, s. 21, to notice of an action of trespass. (9 B. & C. 809.)—*Cook v. Clark*, 4 B. & Ad. 19.

#### NUISANCE.

(*To highways by railway running near it.*) Under acts of parliament empowering a company to make a railway between certain points, (reciting that it would be of great public utility, and materially assist the general traffic of the country,) and to use locomotive engines upon it, the railway was made parallel to an ancient highway, and in some places within a few yards of it. The locomotive engines frightened the horses of persons using the highway. On indictment against the company for a nuisance, it was held that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, the words authorising the use of the engines being unqualified; and the public benefit derived from the railway showed that there was nothing unreasonable in the clause which gave such an authority to the company. *Rex v. Pease*, 4 B. & Ad. 30.

#### OFFICE.

(*Of paymaster of exchequer bills.—Revocation of.*) The office of paymaster of exchequer bills is an office during pleasure only, not during good behaviour, under 48 Geo. 3, c. 1.—The appointment of a paymaster in the room of another is of itself a revocation of the first appointment, though that appointment contained no power of revocation.—*Smyth v. Latham*, 9 Bing. 692.

PAYMENT INTO COURT. See PRACTICE, 4.

PERPETUITY. See EXECUTORY DEVISE.

#### PLEADING.

1. The mis-statement, at the commencement of the declaration, of the form of action, is merely an irregularity, and not fatal on special demurrer.—*Anderson v. Thomas*, 9 Bing. 678.
2. (*In quare impedit.*) The ordinary, unless he has collated, cannot counterplead the plaintiff's title to the patronage. (Hob. 315.) The declaration shows a sufficient avoidance of a living in alleging that the incumbent accepted another benefice with cure of souls, although it contain no allegation that the former benefice was of the value of £8 in the King's books. (4 Rep. 75.)—*Apperley v. Bishop of Hereford*, 9 Bing. 681.
2. (*Variance in declaration on bail-bond.*) Declaration on a bail-bond set

out a *capias* in *assumpsit* to take S. and W., the arrest of S. under it, and the execution of a bail-bond conditioned for S.'s appearance to answer plaintiff in *assumpsit*: Held not to be such a variance between the *capias* and the condition of the bond as to be objectionable on special demurrer. — *Grottick v. Phillips*, 9 Bing. 721.

4. (*Plea of de injuriâ in replevin.*) Replevin: avowry, that plaintiff was an inhabitant of the parish rateable to the poor in respect of a tenement occupied by him within the parish; that a poor rate was made and published, wherein plaintiff was rated at £7; that defendant, as collector, gave him notice thereof and demanded payment, which plaintiff refused; that he was summoned to appear at the petty sessions, where he appeared and showed no cause, whereupon a warrant of two justices was directed and delivered to defendant to distrain plaintiff's goods; with prayer of a return. Plea in bar *de injuriâ*, &c.: Held a proper plea. (8 Rep. 67; 1 Burr. 316; 2 B. & C. 908.)—*Bardons v. Selby*, (in error,) 9 Bing. 756; 1 C. & M. 500.
5. (*In trespass.*) The plaintiff complained in the first count of the declaration of an assault and battery, of being taken through the streets, and imprisoned on a false charge of assault with intent to commit a felony. Another count complained of an assault and imprisonment on a charge of a breach of the peace. A plea to the latter count stated that plaintiff assaulted defendant, whereupon he gave plaintiff in charge of a police officer, who took and carried him before a justice. One assault only was proved at the trial: Held, that this plea was not a complete justification to the first count. (5 B. & A. 220.)—*Stammers v. Yearsley*, 10 Bing. 35.
6. Where a plea, which professes to answer the whole of a count, is no answer to any good part of such count, the plaintiff is entitled to judgment. *Crump v. Adney*, 1 C. & M. 362.

And see BILL OF EXCHANGE, 2; DISTRESS, 3.

#### POACHING.

1. Under 9 Geo. 4, c. 69, s. 2, a keeper, &c. may apprehend poachers, though there are three or more, and armed; for though s. 2 only authorizes apprehending for what are offences under s. 1, and when there are three or more armed they are punishable under s. 9; yet what is punishable under s. 9 is an offence under s. 1, though made liable to a more heinous punishment.—*Rex v. Ball*, Moo. C. C. R. 330.
2. A person lawfully authorized under 9 Geo. 4, c. 69, may apprehend persons found offending under that act, without giving notice of his purpose.—*Rex v. Payne*, Moo. C. C. R. 378.

And see MURDER, 1. 2.

#### POOR RATE.

The occupier of land which requires to be protected from floods at an occasional expense defrayed by a sewer's rate, is rateable to the poor at the same sum as the occupier of lands of the same quality and annual produce in the same parish not liable to the sewer's rate, *minus* the amount



of that rate; the criterion of rating being the net rent which a tenant at rack-rent would pay, he discharging all rates, charges and outgoings. (By three judges, Lord Tenterden dissenting.)—*Rex v. Adames*, 4. B. & Ad. 61.

And see DISTRESS, 1.

**POWER.** See COPYHOLD.

### PRACTICE.

1. (*Uniformity of Process Act.*) The Uniformity of Process Act, 2 W. 4, c. 39, s. 1, does not prevent the signing of a pluries bill of Middlesex, in a suit commenced before the act came into operation.—*Storr v. Bowles*, 4 B. & Ad. 112.
2. (*In real action.*) The Court will not stay proceedings in a writ of right till the costs of a prior ejectment for the same lands are paid. (3 Bing. 167.)—*Bowyear v. Bowyear*, 9 Bing. 670.
3. (*In real action.*) In a writ of right the tenant must begin, though the demi-mark be tendered before the trial. (3 Bing. 446.)—*Spiers v. Morris*, 9 Bing. 687.
4. (*Payment of money into Court.*) A defendant in assumpsit for the breach of an agreement to sell an estate, was not allowed to select certain out of several allegations of damage contained in a single count, and pay money into Court on them only. (2 Burr. 1120; 8 T. R. 47; 3 B. & P. 14; 2 B. & P. 234.)—*Hodges v. Lord Lichfield*, 9 Bing. 713.
5. (*Production of deed for inspection.*) A composition deed between debtor and creditors, containing a release of the debtor, was in the possession of A. as trustee for all parties. B. being sued as surety for a debt due from the debtor to one of the creditors who had executed the composition deed at B.'s request and on his undertaking to continue responsible as surety, the Court refused to compel A. to produce the deed for B.'s inspection.—*Cocks v. Nash*, 9 Bing. 723.
6. (*As to joinder of plaintiff who dissents from the action.*) Where one of several plaintiffs dissents to bringing the action, a court of law will not interpose, except upon a suggestion of fraud.—*Emery v. Mucklow*, 10 Bing. 28.
7. (*In real action.*) Tenant in a writ of right signed judgment of *non pros*, after giving a more distant day for adjourning the essoign than by law he was entitled to. The court set aside the judgment as irregular. (24 Geo. 2, c. 48, s. 3.)—*Twynning, demandant*, 10 Bing. 65.
8. (*New trial.*) Where the plaintiff, having obtained a rule for a new trial, has neglected to take down the cause for trial for more than four terms, the rule cannot be discharged without a term's notice. Nor is the obtaining, by consent, an order to change the attorney, such a proceeding in the cause as to render such notice unnecessary. (8 B. Moore, 579.)—*Deacon v. Fuller*, 1 C. & M. 349.
9. (*Judge's order.*) An order obtained from a judge's clerk by a misstatement is a nullity.—*Wosnam v. Price*, 1 C. & M. 352.

10. (*Setting aside service of writ.*) Where the writ was irregular, but the service regular, and the defendant moved to set aside the service, the court discharged the rule.—*Hasker v. Jarmaine*, 1 C. & M. 408.
11. (*Judgment in sci. fa.*) The court refused to allow a plaintiff to sign judgment on the return of *nihil* to two writs of *sci. fa.*, it not appearing that any endeavour had been made to give the party notice.—*Subine v. Field*, 1 C. & M. 466.
12. (*Judgment as in case of nonsuit.*) Issue was joined in Easter term, and notice of trial given for the second sittings in that term: the plaintiff did not proceed to try, but gave notice of countermand: Held, that plaintiff could not move for judgment as in case of nonsuit till the next term.—*Isaacs v. Goodman*, 1 C. & M. 494.
13. (*New rule to plead.*) Where a writ issued in vacation, and the declaration was delivered, and a rule to plead given, in the same vacation, but plaintiff did not sign judgment till the following term: Held, that it was not necessary to give a new rule to plead in that term.—*Mould v. Murphy*, 1 C. & M. 495.
14. (*Short notice of trial.*) Short notice of trial, in a country cause, means in all cases four days peremptorily. (Reg. 58, H. T. 2 Wil. 4.)—*Lawson v. Robinson*, 1 C. & M. 499.
15. (*Distringas.*) The copy of the writ of summons must be left on the third day at the last call for the purpose of serving defendant, or no distringas will be granted.—*Hill v. Mould*, 3 Tyrw. 162.
16. (*Affidavit to hold to bail.*) Affidavit to hold the drawer or indorser of a bill or note to bail, must state nonpayment by the acceptor or maker. (7 Bing. 251.)—*Smith v. Escudier*, 3 Tyrw. 219.
17. (*Affidavit to hold to bail.*) Affidavit to hold to bail for money lent, must state by whom lent.—*Smith v. Stephens*, 3 Tyrw. 219.
18. (*Charging in execution.*) The rule charging a defendant in execution need not be lodged at the prison on the same day the defendant is charged in execution.—*Blandy v. Webb*, 3 Tyrw. 235.
19. (*Affidavit to hold to bail*) An affidavit on a note payable by instalments should show them to be due, and it is not sufficient to state that the *said sum* has not been paid.—*Hart v. Myerris*, 3 Tyrw. 238.
20. (*Distringas.*) The service of the writ of summons, to ground a motion for a *distringas*, must be made at the dwellinghouse or place of abode of the party; service at his employer's office is not enough.—*Thomas v. Thomas*, 2 Moo. & S. 730.
21. (*Entering up judgment nunc pro tunc.*) In Hilary term 1832, a verdict was taken for the plaintiff by consent, subject to a reference. The arbitrator made an award in favour of the plaintiff, after the end of Trinity term, the defendant having died in the mean time. On motion in Michaelmas term, the court allowed judgment to be entered nunc pro tunc.—*Miller v. Spurrs*, 2 Moo. & S. 730.

And see AMENDMENT.—BAIL.—EJECTMENT.—PROCESS.

## PRESUMPTION.

(*Of reconveyance.*) Tenant in tail conveyed by feoffment in 1779: but the feoffee never entered, the feoffment remained in possession of the feoffor and those claiming under him, who suffered a recovery in 1789, and continued in possession until 1829: Held, that a reconveyance from the feoffee might be presumed.—*Tenny v. Jones*, 10 Bing. 75.

And see EVIDENCE, 4.

## PRINCIPAL AND ACCESSORY.

1. Under the 3 Geo. 4, c. 24, s. 3, a receiver may be indicted and tried for felony though the principal is not convicted, whatever the goods be. (Overruling *Rex v. Cale*, Ry. & M. 11.)—*Rex v. Solomons*, Moo. C. C. R. 292.
2. On an indictment against an accessory, the confession of the principal is not admissible to prove his guilt; it must be proved *aliunde*, especially if the principal be alive. *Semble*, that the conviction of the principal, whether by verdict or confession, is not evidence against the accessory to prove the guilt of the principal.—*Rex v. Turner*, Moo. C. C. R. 347.
3. A general conviction of a prisoner, charged both as principal in the first degree, and as aider and abettor of other men, in rape, is valid on the count charging him as principal: and on such indictment evidence may be given of several rapes on the same woman at the same time by the prisoner and other men, each assisting the other in turn, without putting the prosecutor to his election.—*Rex v. Folkes*, Moo. C. C. R. 354.
4. An accessory before the fact to self murder was not liable at common law, because the principal could not be tried. He is not therefore now liable under 7 Geo. 4, c. 64, s. 9.—*Rex v. Russell*, Moo. C. C. R. 356.

And see INDICTMENT, 1.—FELO-DE-SE.—FORGERY, 2.

## PROCESS.

1. (*Amendment of.*) The copy of a writ cannot be amended after service:—*Byfield v. Street*, 10 Bing. 27.
2. Since the Uniformity of Process Act, 2 & 3 Will. 4, c. 39, the suing out the writ of summons is the commencement of the action for all purposes.—*Alston v. Underhill*, 1 C. & M. 492.
3. (*Service.*) Service, or knowledge, of copy of process, as well as of process itself, must be denied, in order to set aside proceedings for irregularity and want of service of process.—*Cohen v. Watton*, 3 Tyrw. 238.
4. (*Sheriff's return.*) Where the sheriff has neglected to indorse on the *capias* the day of its execution, according to Rule 4, M. T. 3 Will. 4, the remedy is by a rule calling on him to amend the return; not by attachment.—*Ridley v. Weston*, 2 Moo. & S. 724.

## PROMISSORY NOTE.

(*Given to secure instalments, action on.*) A promissory note for 100*l.* on the face of it payable on demand, was given to the trustee of a building society, to secure certain instalments, fines, and interest. The payee sued on the note, and took a cognovit for the instalments then due, and costs, which were paid, and he gave a receipt as for debt and costs in

the action: Held, that he could not sue again on the note for instalments that subsequently became due.—*Siddall v. Rawcliffe*, 1 C. & M. 487.

#### QUAKER.

A Quaker is not a good juryman on his solemn affirmation. (See now 3 & 4 Will. 4, c. 49.)—*Rex v. Channens*, Moo. C. C. R. 374.

QUARE IMPEDIT.—See PLEADING, 2.

#### RAPE.

On an indictment for a rape (or sodomy) under 9 Geo. 4, c. 31, s. 18, penetration is sufficient, though the jury negative emission (overruling (*Rex v. Russell*, 1 M. & M. 122.)—*Rex v. Cox*, Moo. C. C. R. 337; *Rex v. Recksepear*, Ib. 342.

And see PRINCIPAL AND ACCESSORY, 3.

#### REMAINDER.

Lands were settled on such person as at the decease of A. should be the second son then living of A. and B. in tail male; and for default of such issue, to the third, fourth, &c. (other than an eldest or only son,) in like manner; for default of such issue, to the eldest or only son in tail male: and for default of such issue, to A. in fee. A. died in 1766, leaving four sons. The eldest died in 1770, an infant without issue; the second in 1829, without issue; the third in 1783, without issue. On a suit instituted in 1830, held, that the *fourth* son had become entitled to an estate tail under the settlement.—*Hawkins v. Hawkins*, 9 Bing. 768.

#### REPLEVIN.

(*Action against sureties on replevin bond.*) It is no plea to an action against the sureties in a replevin bond, that the replevin cause was referred to an arbitrator, who enlarged the time for making his award without the knowledge of the sureties. (Cro. Eliz. 697; 5 B. & A. 187.)—*Aldridge v. Harper*, 10 Bing. 118.

And see PLEADING, 4.

#### RESCOUS.

The sheriff having returned a rescue from his bailiff, the Court granted a rule absolute in the first instance against the rescuers. (Sir W. Jones, 197.)—*Gobby v. Dewes*, 10 Bing. 112.

#### SHERIFF.

1. (*Liability of, in trover.*) A sheriff is liable in trover for selling, with notice of the assignment to the provisional assignee, goods of an insolvent taken in execution under a judgment on a cognovit, subsequent to the commencement of the insolvent's imprisonment, but before the assignment to the provisional assignee. (7 Geo. 4, c. 57, s. 34. *Balme v. Hutton*, 9 Bing. 471.)—*Groves v. Cowham*, 10 Bing. 5.

2. (*Liability of, for his officer.*) A *fi. fa.* issued on a judgment, directed to the coroner, and the plaintiff's attorney indorsed thereon the name of A. an officer of the sheriff, who received from the broker that seized the goods the proceeds of the sale, and did not hand them over. A pur-

chaser at the sale, the goods he bought having been claimed by a third party and taken away from him, sued the sheriff for his purchase-money: Held, that A. was in this case the officer, not of the sheriff, but of the coroner, and that the former was therefore not liable.—*Surjeant v. Cowan*, 1 C. & M. 491.

And see INTERPLEADER ACT, 1, 3.

#### SHIP.

(*Part ownership of. — Destruction of ship by part owner.*) Two or more persons may hold a share of a ship jointly.—The vendee of a share shall be deemed complete part owner, if an entry of the bill of sale to him according to the 6 Geo. 4, c. 110, s. 37, be made in the proper book of registry, although it does not in terms express that the bill of sale was produced; because it would be against the officer's duty to make the entry except on such production. And if a date be given which has nothing to apply to but such production, that will imply it.

The destruction of a vessel by a part-owner, though he have insured the whole ship, and promised that the other part-owners shall have the benefit of the insurance, may be charged as an offence with intent to prejudice the other part-owners.—*Rex v. Philp*, Moo. C. C. R. 263.

#### STAMP.

1. A bond given to secure a London banker from the balance arising from paying bills, &c. for a country banker, contained an express stipulation that the whole amount of monies to be ultimately recoverable should not exceed 1000*l.*: Held that it did not require a 25*l.* stamp.—*Lloyd v. Heathcote*, 1 C. & M. 336.
2. (*On agreement.*) Defendant, and about two hundred others, signed an agreement to pay "rateably and proportionably according to the sums of money severally subscribed by them and set opposite to their respective names," and wrote the sums in figures opposite their several names. The words of the agreement, including the signatures and sums as far as defendant's inclusively, were less than 1080; the words of the agreement including all the signatures, but without the sums, were less than 1080, but with the sums more than 1080. A single 1*l.* stamp held insufficient.—*Linley v. Clarkson*, 1 C. & M. 436.
3. (*Felony in cutting off.*) A party who innocently cuts off the stamp and part of the parchment from an instrument, will be guilty of a capital offence under 55 Geo. 3, c. 184, s. 7, if he afterwards gets off such stamp from that part of the parchment with intent to use it again; and that, whether the impression was made before or after 55 Geo. 3, c. 184. [See now 3 & 4 Will. 4. c. 97.] *Rex v. Smith*, Moo. C. C. R. 314.

And see AUCTION.

#### TOLL.

1. It is not unreasonable that a party who is made liable to toll in case of his passing 100 yards along a turnpike road should pay the toll, although a part of the 100 yards along which he passes consists of a portion repair-

able by the county, as being at the end of a bridge; since this also, as well as the rest, is virtually repaired by the public.—*Bussey v. Storey*, 4 B. & Ad. 98.

2. A toll of 1*d.* for every pig brought into a market is not unreasonable.—*Wright v. Bruister*, 4 B. & Ad. 116.

And see MORTGAGE.

TRESPASS.—See PLEADING, 1.

#### TROVER.

(*Discharge of damages.*) After verdict for plaintiff in trover, the goods were seized in defendant's hands for rent due to the landlord of the premises, which plaintiff was liable for: defendant paid the rent, and the Court allowed him to deduct the amount from the verdict.—*Plevin v. Henshall*, 10 Bing. 24.

#### VENUE.

The venue was changed upon terms, to favour a prisoner's discharge.—*Keys v. Smith*, 10 Bing. 1.

#### WARRANT OF APPREHENSION.

A warrant having a blank for the Christian name of the person to be apprehended, and giving no reason for omitting it, but describing him only as the son of J. L., and stating the charge to be for assaulting A. B., without particularising the time, place, or circumstances of the assault, is too vague and general; and if the party in resisting it kills the officer, it will not be murder.—*Rex v. Hood*, Moo. C. C. R. 281.

#### WARRANT OF ATTORNEY.

(*How far void for not being filed.*) A warrant of attorney not filed pursuant to 3 Geo. 4, c. 39, s. 2, is not void generally, but only as against an assignee under a valid commission of bankruptcy.—*Aireton v. Davis*, 9 Bing. 740.

And see EVIDENCE, 2.

#### WAY.

(*Grant of, in conveyance.*) The words in a conveyance "with all ways thereto belonging, or in anywise appertaining," will not pass a way strictly appurtenant; unless the parties appear to have intended to use the words in a larger sense than their ordinary legal one. And *semble*, that such an intention cannot be collected from anything (as a plan, or particular of sale,) dehors the deed. (3 Taunt. 24.)—*Barlow v. Rhodes*, 1 C. & M. 439.

#### WOUNDING.

1. The continuity of the skin must be broken, to constitute a wounding within 9 Geo. 4, c. 31, s. 12.—*Rex v. Wood*, Moody's C. C. R. 278.
2. An injury by a hammer flung at a person, or a kick from a shoe, by which the skin is divided, is a wound within that statute.—*Rex v. Withers*, Moo. C. C. R. 294; *Rex v. Briggs*, Ib. 318.

3. In an indictment for wounding under that statute the instrument or means by which the wound was inflicted need not be stated, and if stated, need not be proved in the manner laid. On an indictment laying the wound to have been occasioned by a blow from a stick and kicking with the feet, proof that the wound was caused by either the one or the other will be sufficient, though it be uncertain by which it was.—*Rex v. Briggs*, Moo. C. C. R. 318.

WRIT OF RIGHT.—See PRACTICE, 2, 3, 7.

---

REGULÆ GENERALES. (TRIN. TERM, 1833.)

IT IS DECLARED AND ORDERED, That in all cases in which a defendant shall have been or shall be detained in prison on any writ of *capias* or detainer, under the statute 2 Will. 4, c. 39, or being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been, or shall be rendered to prison before declaration on any such process, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render, and notice thereof, otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the aforesaid statute 2 Will. 4, c. 39, Sched. No. 2; unless further time to declare shall have been given to such plaintiff by rule of Court or order of a judge. *(Signed by all the Judges.)*

IT IS ORDERED, That from the present day, in all actions against prisoners in the custody of the Marshal of the Marshalsea, or of the Warden of the Fleet, or of the Sheriff, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules as in actions against defendants who are not in custody. *(Signed by all the Judges.)*

IT IS ORDERED, That from and after the 10th day of July next, where the plaintiff proceeds by action of debt on the recognizance of bail in any of the Courts at *Westminster*, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and that upon such render being duly made, and notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only.

*(Signed by all the Judges.)*



## EQUITY.

---

(2 Russell & Mylne, Part 1 ; 6 Bligh, Part 2.)

---

### ACCOUNT.

The widow of a testator, with the full knowledge of the heir at law, was let into, and continued during her life in possession, of certain freehold houses, under an erroneous supposition that under the will she took a life interest in them. She also paid debts and legacies of the testator to a large amount, which had not been repaid at her death: Held, that the suit was maintainable for the rents and profits during her continuance in possession; that as the statute of limitations was not insisted on by the answer, the account should be taken from the time when the plaintiffs' title accrued. (*Hercy v. Ballard*, 4 Bro. C. C. 468; *Collins v. Archer*, 1 R. & M. 284); that the plaintiff could not claim to be allowed the amount of rents received against payments made by the widow in her character of executrix, such payments forming no personal demand against the plaintiff.—*Money Penny v. Bristow*, R. & M. 117.

### ANNUITY.

Where the grantee of an annuity is induced to become the purchaser by misrepresentation or improper concealment of facts on the part of the grantor or his agent, although he can sustain an action at law for damages, in the nature of an action of deceit, yet a Court of Equity, with respect to the fraud, has a concurrent jurisdiction. (*Evans v. Bicknell*, 6 Ves. 173.)—The grantor of an annuity, or his agent, is not bound to lay open to the intended grantee all the circumstances of the situation of the grantor. They are bound only to give honest answers to questions put to them by the intended grantee.—*Adamson v. Evitt*, R. & M. 66.

### COPYHOLD.

Where the lord of a manor admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as assenting to those trusts, and cannot afterwards claim against them, whether he were or were not acquainted with the precise nature of the trusts. (*Burgess v. Wheate*, 1 Eden. 177.)—*Weaver v. Maule*, R. & M. 97.

### COSTS.

Where a bill is filed to set aside a will, and upon an issue directed the jury find in favour of the will, and a new trial is subsequently refused, the bill will be dismissed without costs, unless the validity of the will could clearly

have been tried by ejectment; but the plaintiff will be ordered to pay the costs of the issue. (*Scaife v. Scaife*, 4 Russ. 309.)—*Tatham v. Wright*, R. & M. 31.

### EVIDENCE.

1. In a pedigree case, where the object is to connect A. and C., after proving that B., a deceased person, was related to A., it is competent to give in evidence declarations of B., by which he claimed relationship with C. A paper in the handwriting of B., found in his repositories at the time of his death, purporting to be a genealogical narrative and pedigree of his family, of which it represents C. to have been a member, is admissible for the same purpose, though not made public in B.'s lifetime, and professing to be founded chiefly on hearsay. (*Berkeley Peerage Case*, 4 Campb. 401; *Whitelocke v. Baker*, 13 Ves. 511.)—*Monkton v. Attorney-General*, R. & M. 147.
2. *Seemle*, that in a pedigree case, statements contained in monumental inscriptions, and hearsay declarations made by a deceased relative, are competent evidence to prove the respective ages of the persons to whom they refer, as well as the fact of their relationship to each other. (*Higham v. Ridgway*, 10 East, 109; *Herbert v. Tucker*, T. Raym. 84.)—*Kidney v. Cockburn*, R. & M. 167.

### EXECUTOR.

Upon an account of debts before the Master in a suit for the administration of assets, the plaintiff had objected to the demand of a creditor, on the ground that it was barred by the statute of limitations, and the Master allowed the objection, although the executor did not insist upon it, and was willing to waive it. An exception to the Master's report by the executor was overruled, on the ground that after a decree, the executor was not at liberty to do any act which affected the relative rights of the creditors. (S. C. 1 R. & M. 374.)—*Shewen v. Vanderhorst*, R. & M. 75.

### HUSBAND AND WIFE.

1. (*Separate Estate of Wife*.) A testator devised lands to trustees upon trust to pay the rents to plaintiff during his life; but if he should become insolvent or bankrupt, or assign over the said rents, then to pay to the wife of plaintiff an annuity of 100*l.* during his life, and after the decease of plaintiff an annuity of 30*l.* to his wife so long as she should continue his widow: Held, that the annuity of 100*l.* was not the separate estate of the wife, but passed by the husband's assignment for a valuable consideration, (*Roberts v. Spicer*, 5 Madd. 491); and that the wife, as against such assignee, had no equity for a settlement out of the annuity. (*Elliott v. Cordell*, 5 Madd. 149.)—*Stanton v. Hall*, R. & M. 175.
2. (*Same*.) Lands were settled upon trust, after the death of the settlor, to sell the same and distribute the proceeds among the sons and daughters of settlor; and as to the shares of two other daughters, who were married, in trust to pay the same into their own proper and respective hands, to and for their own respective use and benefit in case they should respectively be then living; but, in case they should be then dead, to pay their shares to

their respective husbands for their own use and benefit: Held, that on the principle which requires the husband to be excluded by expressions that leave no doubt of the intention, and which forbids the Court to speculate on what the probable object of the donor might have been, these shares did not vest in the married women to their separate use. (*Wills v. Sayer*, 4 Mad. 409; *Roberts v. Spicer*, 2 Rep. H. & W. 157.)—*Tyler v. Lake*, R. & M. 183.

3. (*Wife's Equity*.) A husband, whose wife was entitled to a fund in Court, signed a memorandum, after marriage, agreeing to secure half her property on herself: Held, that the wife was competent to waive this agreement, and that any benefit her children might have taken under it was defeated by her waiver. (*Fenner v. Thompson*, R. Lib. 1812, A. fol. 939; see *Lloyd v. Williams*, 1 Mad. 450.)—*Fenner v. Taylor*, R. & M. 190.

4. (*Anticipation*.) A testatrix bequeathed the dividends of stock to a *feme covert* for life, not to be subject to the debts or controul of her then present or any other husband, and without any power to charge, anticipate or assign the growing payments thereof: Held, that the legatee, on becoming discovert, might validly dispose of her entire life interest.—*Jones v. Salter*, R. & M. 208.

5. (*Same*.) A testator directed one third of his residuary estate to be invested in the purchase of an annuity for the life of his sister, who was a widow at the date of the will and so continued, for her separate use, independent of any husband she might marry, without power to sell or assign by anticipation, and her receipts to be sufficient discharges: Held, that the annuity was not inalienable, but that the legatee was entitled to an absolute interest, either in the one third of the testator's residuary estate, or in the annuity to be purchased with that share, (*Barton v. Briscoe*, Jac. 603); the costs of the suit were directed to be borne by the legatee's share, as that formed a distinct fund, clearly severed from the bulk of the residue. (*Jenour v. Jenour*, 10 Ves. 562.)—*Woodmeston v. Walker*, R. & M. 197.

6. (*Same*.) A testatrix bequeathed a sum of money to trustees, in trust to invest and apply a competent part of one-third of the interest to the support of each of three female infants until twenty-one, when the whole interest was to be paid to them for their respective lives in equal shares; and if any of them should marry, one-third part of the fund was directed to be held in trust for her separate use during her life, and the interest thereof to be paid to her accordingly, but not by way of anticipation, for her separate use. An assignment by one of them after she became of age, and before marriage, of her whole interest in the legacy, was held to be valid. (*Cases ante*.—*Newton v. Reid*, 4 Sim. 141.)—*Brown v. Pocock*, R. & M. 210.

#### INFANT HEIR.

1. A testator devised his lands to two persons as tenants in common in fee; one of them died intestate, leaving an infant heir. In a creditor's suit,

after a devise for sale, the infant heir was ordered to join in the conveyance to the purchaser under 1 W. 4, c. 47, s. 11.—*Brook v. Smith*, R. & M. 73.

2. The 11th section of the stat. 1 W. 4, c. 47, applies to a case where the decree in the cause was made prior to the act, as being within the spirit and intention of the act.—*Chapman v. Tennant*, R. & M. 74.

### MILITARY PRIZE.

Military prize is not in the nature of military pay, but is capable of being assigned by the captor before any interest in it has been vested in him by actual grant from the crown.

A warrant of the crown granting military prize to trustees, upon trust to collect, recover and receive the same; and directing the trustees, as soon as the case would admit, to prepare a scheme for distribution according to certain principles recommended in a minute of the Commissioners of the Treasury, and approved of by the crown; which scheme was to be submitted by the trustees to the commissioners for the signification of the royal pleasure therein,—is not an absolute or final grant; it creates no vested interest in any particular individual, nor can a distribution be compelled by a suit in equity against the trustees.

*Semble*, the crown may at any time before distribution alter or revoke a grant of military prize, the captor having no interest whatever beyond what he takes as the mere gift of the crown. (Case of *Elsebe Maas*, 5 Rob. 181.)

*Alexander v. The Duke of Wellington*, R. & M. 35.

### MORTGAGE.

(*Concurrent remedies*.) A mortgagee by proceeding to execution against the body of the mortgagor, does not thereby release his interest in the land.—*Davis v. Battine*, R. & M. 76.

### NEW TRIAL.

Where a motion for a new trial of an issue was made on three grounds, namely, the alleged improper summing up of the judge; the weight of evidence being against the verdict; and only one of the three attesting witnesses to a will having been examined at the trial; the motion was refused, on the ground that on the evidence alone, without regard to the summing up of the judge, the Court would have directed a new trial if the jury had come to a different conclusion; and because the two attesting witnesses who were not examined were present in Court during the trial, and were tendered to the party moving for a new trial, who refused to examine them.

*Semble*, it is not an universal rule that on the trial of an issue *devisavit vel non* all the attesting witnesses must be examined, except where the will is sought to be established. (*Bootle v. Blundell*, 1 Mer. 193.)—*Tatham v. Wright*, R. & M. 1.

### PEERAGE.

In the grant of a peerage, a limitation to the grantee *and his heirs male*, is not void; but the honor, in default of heirs male of the body of the

grantee, will descend to his heirs male collateral. (Oxford Case, Cruise on Dig.)—*Devon Peerage Claim*, Bl. 220.

## POWER.

1. (*Execution.*) A testator gave the residue of his personal estate to his wife "for her own sole use and disposal, trusting that she would thereout provide for and maintain his family, and particularly his own son and at her decease give and bequeath the same to her children by him in such manner as she should appoint:" Held, that the widow could not exclude any of the children. (*Kemp v. Kemp*, 4 Ves. 771.) That unless the interest be expressly given over in case of no appointment, those children only would take who could have taken by appointment; and the power being plainly testamentary, could be only executed in favour of children who could take by will; an unappointed part of the fund would therefore be divided between the children living at the mother's death, to the exclusion of the representatives of a deceased child. (*Needham v. Smith*, 4 Russ. 818.)—*Walsh v. Wallinger*, R. & M. 81.
2. (*Execution.—Breach of trust.*) On a marriage, the wife's property was settled to her for life for her separate use, with remainder as the wife should appoint by any writing under her hand attested by two witnesses, then, after the death of the wife, to the children of the marriage. The trustees, upon the application of the husband and wife, made by letter signed by both of them, but not attested, parted with the trust fund to the husband. On a bill filed by the children after the death of the wife, held, that the ceremonies required by the settlement were introduced for the purpose of protecting the wife against the influence of the husband, and the trustees were liable to replace the fund. (*Cooke v. Quayle*, 1 R. & M. 535.)—*Hopkins v. Myall*, R. & M. 86.

## PRACTICE.

1. (*Injunction.*) An order that a defendant in contempt for breach of an injunction, shall stand committed unless cause be shown on a stated day, is not irregular though served personally. (*Rudge v. Hughes*, R. L. B. fol. 1782.)—*Durant v. Moore*, R. & M. 33.
2. (*Parties.*) Where the person whose interests are sought to be affected by a decree is out of the jurisdiction of the Court, the suit cannot proceed in his absence. (*Roveray v. Grayson*, 3 Swan. 145; *Stratton v. Davidson*, 1 R. & M. 484.)—*Browne v. Blount*, R. & M. 83.
3. (*Alternative prayer.*) Where the main object of a suit entirely fails, the Court will refuse a secondary and trivial relief, on which, if it stood alone, the plaintiff might, perhaps, be entitled to succeed. As where a bill prayed the specific performance of an agreement for the sale of a reversionary interest, or in the alternative, to have the deposit repaid; the Court having decided against the plaintiff's right to the principal relief, refused the alternative part of the prayer, and dismissed the bill with costs. (*Todd v. Gee*, 17 Ves. 273.)—*Kendall v. Beckett*, R. & M. 89.
4. (*Serjeant at Arms.*) To obtain an order for a Serjeant at Arms under

the statute 1 Wm. 4, c. 36, s. 15, rule 1, in the affidavit it is not sufficient to state that at the time of issuing the writ of attachment the defendant's last and only known place of abode was in the county into which the writ was issued; it must state the party's belief that at that time the defendant was in the county into which the writ was issued.—*Handfield v. Wildes*, R. & M. 91.

5. (*Same.*) To ground an order for a Serjeant at Arms under the statute 1 Wm. 4, c. 36, s. 15, rule 1, the affidavit need not state the party's belief that due diligence has been used in ascertaining the defendant's residence, and in endeavouring to apprehend him; but it must swear to those facts, and in some way or other satisfy the Court of their truth.—*Wright v. Green*, R. & M. 93.
6. (*Publication.*) The Court will not make an order for the publication of depositions taken in a suit to perpetuate testimony, whilst the witnesses are alive.—*Barnsdale v. Lowe*, R. & M. 142.
7. (*Claim before Master.*) After a residuary fund had been paid into the Exchequer, under a decree establishing the right of the Crown, parties setting up a title to the fund were permitted, upon petition in the cause, and with the leave of the Crown, to go before the Master for the purpose of making out their claim.—*Moulton v. Attorney-General*, R. & M. 147.

#### SPECIFIC PERFORMANCE.

(*Reversionary Interest.*) The purchaser of a reversionary interest seeking to enforce a specific performance, must show that the transaction was in all respects fair, and that an adequate consideration had been given. (*Peacock v. Evans*, 16 Ves. 512; *Gowland v. De Faria*, 17 Ves. 20.)—*Kendall v. Beckett*, R. & M. 89.

#### TITHES.

1. A modus payable by every householder in lieu of the tithe of hay, without regard to the fact whether such householder has or has not hay, is valid (*Bennett v. Read*, 4 Gw. 1272,); but otherwise, if it be not alleged with certainty that it is to be paid without regard to that fact.—*Gronow v. Edwards*, R. & M. 102.
2. Sixpence in lieu of a tithe pig is rank.—S. C.
3. A modus of one penny for fruit and garden stuff is good, though not pleaded to be for fruit and garden stuff growing in a garden.—S. C.

#### TITLE.

The rule of law that the title to land cannot be tried in an action for money had and received, applies only to cases where the present right to land is in question, and not to cases where the question relates only to past-gone rents; as a suit against the executor of a person wrongfully in possession for the past rents and profits. (*Hambly v. Trott*, Cowp. 371; *Pulteney v. Warren*, 6 Ves. 72.)—*Moneypenny v. Bristow*, R. & M. 117.

#### WILL.

1. (*Uncertainty.*) A conditional bequest "To the Fellows and Demies of Magdalene College, Oxford," upon the happening of a certain event, was

held void for uncertainty; the language of the condition, and the description of the legatees, being so obscure that the Court was unable to collect the intention of the testator with respect either to the individuals who were to take, or the time and manner of taking.—*Attorney General v. Sibthorpe*, R. & M. 107.

2. (*Republication.*) Where a codicil applies solely to property previously devised by the will, it has not the effect of republishing the will so as to carry after-acquired property. (*Bowes v. Bowes*, 7 T. R. 482; 2 B. & P. 500.)—*Moneypenny v. Bristow*, R. & M. 117.
3. (*Construction.*) A testator gave to his mother an annuity for life, and after her decease to his sister, should she be a widow, but not otherwise, but to revert back to his children after her death. At the date of the will and death of the testator his sister was a married woman, and she continued so till some time after the death of the testator's mother, when, her husband having died, she filed her bill claiming the annuity. A general demurrer was allowed. (*Ellison v. Airey*, 1 Ves. sen. 111; *Godfrey v. Davis*, 6 Ves. 43.)—*Bartleman v. Murchison*, R. & M. 136.
4. (*Same.*) A testator gave £4000 to trustees, to be invested in trust to pay the dividends to his daughter S. A. during her coverture, and after the decease of her husband G. B., to transfer the capital to her father's own use and benefit; but in case G. B. should survive S. A., then in trust for the testator's five sons and their issue (if any) to be divided among them in equal shares, such issue to take *per stirpes* and not *per capita*. And the testator gave the residue of his personal estate to his five sons and their respective issue, (if any,) such issue to take *per stirpes* and not *per capita*, to be divided amongst them in equal shares and proportions; the shares of such of them as should have attained the age of twenty-one to be paid to them respectively forthwith after the testator's decease, and the shares of such of them as should be under the age of twenty-one years to be paid to them when and as they should respectively attain such age of twenty-one years:—Held, that upon the death of S. A. in the life-time of G. B., each of the sons of the testator who should then be living would be absolutely entitled to one-fifth part of the stock; but if any of them should die in the life-time of S. A., leaving issue, such issue, if living at the death of S. A., would be entitled to such share as the parent would have taken if living; such issue to take such shares equally; and that the sons of the testator, living at his death, took an absolute interest in the residue. (*Wilkinson v. South*, 7 T. R. 555; *Butter v. Ommaney*, 4 Russ. 70.)—*Pearson v. Stephen*, Bl. 204.



## BANKRUPTCY.

[2 Deacon and Chitty, Part 2.]

## APPEAL.

1. (*Subject of.*) The third section of the late Bankrupt Act restricts the right of appeal from the Court of Review to the Lord Chancellor to matters of law or equity, or on the admission or refusal of evidence. Therefore a mere question of fact, as whether a party is or is not a trader, is not the subject of appeal.—*Exp. Hinton*, 407.
2. (*Special case.*) It is not a matter of discretion in the Court of Review to grant an appeal in a special case. The party has a right to it if his facts are properly stated.—*S. C.*

## ASSIGNEE.

1. (*Purchase by.*) An assignee purchases as trustee some shares of the bankrupt in certain mines, and after retaining them as trustee for a year purchases them for his own use: Held, that the whole transaction was void, on the general principle that an assignee cannot purchase the bankrupt's property, either for himself or another, and therefore that although the whole transaction was fair, yet the assignee must be taken to hold the shares as a trustee for the general creditors of the bankrupt; the *bona fides* forms no part of the question. (*Exp. Bennett*, 10 Ves. 385.)—*Exp. Grylls*, 290.
2. (*Accounts.*) One of two assignees signed the audit paper previous to a dividend, admitting that a certain sum was reserved by the assignees and applicable to the claims of the joint creditors. The bankrupt, after the death of this assignee, was held entitled to an enquiry whether any part of the sum reserved ever came to the hands of the surviving assignee. (6 Geo. 4, c. 16, s. 132.)—*Exp. Coombes*, 319.
3. (*Official.*) Although the Court has a controlling power in the appointment of an official assignee by the Commissioner (1 & 2 Wm. 4, c. 56, s. 41,) yet the Court will not interfere unless the commissioner has exercised an unsound discretion in the appointment.—*Exp. Bramston*, 375.
4. (*Action by creditor.*) Where the assignees refuse to bring an action for the recovery of property which a creditor alleges to have belonged to the bankrupt, the Court will not order a new election of assignees, but will permit the creditor to bring the action in the name of the assignees, upon entering into a proper indemnity.—*Exp. Ryland*, 392.

**COSTS.**

Where an order had been made under the old jurisdiction in bankruptcy, for the taxation of the solicitor's bill of costs, the Court doubted whether they could hear a subsequent petition for the costs of the taxation, until the Master had made his certificate under the former order, and the original petition was also set down in the paper.—*Exp. Elsee*, 332.

**EXAMINATION.**

Where a bankrupt has sold goods for a price lower than what he gave for them, the purchaser, when summoned before the Commissioner for examination, is bound to answer the question, "to whom did you subsequently sell the goods?" for it materially concerns the estate of the bankrupt to ascertain whether the sale was *bona fide*.—*In the matter of Falk*, 415.

**FIAT.**

1. After a *fiat* had issued, the bankrupt entered into a negotiation with his creditors to prevent the prosecution of it; and the solicitor of one of the creditors promised to communicate his final determination at a certain time on the following day, being the sixteenth after the date of the *fiat*; but before the time expired he struck another docket for non-prosecution of the first under the general order. A petition to supersede the first *fiat* was dismissed with costs.—*Exp. Baker*, 362.
2. (*Costs.*) Where a fiat is annulled after adjudication, for an insufficient act of bankruptcy, it is always at the costs of the petitioning creditor.—*Exp. Fletcher*, 374.

And see PRACTICE, 8.

**GUARANTEE.**

C. and Co., before their bankruptcy, guaranteed to J. A. the payment of £300, for the erection by him of a sugar mill for D., on the production by J. A. of the certificate of an engineer that he had properly erected the mill. The certificate was produced, stating, however, a deviation from the original plan with the consent of D., upon which C. and Co. informed J. A. that "it would not be in their power in their then circumstances to make the payment:" Held, that C. and Co. not having made any objection to the sufficiency of the certificate, their assignee could not do so, and therefore that J. A. might prove for the £300 under the *fiat* against C. and Co.—*Exp. Ashwell*, 281.

**MORTGAGE.**

1. (*Equitable.*) M. and A. deposit with S. and Co. the mortgage deeds of certain colonial property for securing a floating balance due from M. and A. to S. and Co., and afterwards execute an assignment of the mortgage debt, "in addition to the securities then already held by S. and Co.," but without making any actual assignment of the mortgage itself, or the mortgage property: Held, that the object of the deposit being clear, S. and Co. continued the equitable mortgagees of the property.—*Exp. Smith*, 271.
2. (*Same.*) Where an equitable mortgagee is also an assignee, a solicitor

will be appointed to take the account, and conduct the sale. (*Exp. Cowdry*, 2 G. & J. 272.)—*Exp. Lees*, 360.

3. (*Priority*.) An equitable mortgagee will not be preferred to a subsequent legal mortgagee who has no notice of the equitable mortgage; and the onus lies on the former claiming a priority to prove that the latter had such notice.—*Exp. Hardy*, 393.
4. (*Crops*.) An equitable mortgagee is entitled to the growing crops and rents from the date of the order of sale. (*Exp. Bignold*, 3 G. & J. 273.)—*Exp. Bignold*, 398.
5. (*Trustee*.) Where a conveyance by way of mortgage is made to a trustee for the mortgagee, in trust to sell, and the trustee becomes a bankrupt, the mortgagor should join in the application for the appointment of another trustee. (6 Geo. 4, c. 16, s. 79.)—*Exp. Orgill*, 413.

#### NEW TRIAL.

Where upon the trial of an issue to ascertain whether at the time of issuing the commission the bankrupt was indebted to the petitioning creditor in a sufficient sum to support the commission, the bankrupt took an objection to the constitution of the debt, which he had not alleged in his petition to supersede, and the jury found a verdict against the petitioning creditor, the Court granted a new trial on the ground of surprise.—*Exp. Christie*, 461.

#### POLICY.

An equitable mortgagee of two policies of assurance which the bankrupt had effected on his life, wrote to the insurance-office, saying, "I am holder of the under-mentioned policies, and shall feel obliged if you will inform me what sum the office will give me if they are delivered up to be cancelled, with the consent of the parties:" Held, that this was a sufficient notice to the office of a change of ownership; and the assignees, who contested the validity of the mortgage on the ground of insufficient notice, were directed personally to pay the costs of a petition presented by them for that purpose. (See *Jones v. Gibbons*, 9 Ves. 411; *Williams v. Thorp*, 2 Sim. 259.)—*Exp. Stright*, 314.

#### PRACTICE.

1. (*Motion*.) Where an order in bankruptcy reserves further directions and costs, a subsequent application as to costs only may be made by motion; but as to further directions it must be by petition.—*Exp. Shadbolt*, 286.
2. (*Service*.) The solicitor for the respondents ought to have notice of an application as well as the respondents themselves.—S. C.
3. (*Affidavits*.) On the hearing of exceptions to the Master's report, those affidavits only in support of or against the original petition can be read, which were used in evidence before the Master.—*Exp. Grylls*, 290.
4. (*Same*.) Where the affidavits in support of a petition were very voluminous, the Court gave time to the respondent to answer them, on payment of the costs of the application and of the day, although the petition was in

the paper for hearing, and twelve days had elapsed since the affidavits were filed.—*Exp. Williamson*, 317.

5. (*Inspection of proceedings.*) Where a person against whom a fiat is issued, applies to the Court for a suspension of the advertisement, and swears positively that there is no petitioning creditor, it is not necessary that the Court should inspect the proceedings.—*In the matter of Fletcher*, 377.

6. (*Same.*) Where a trader against whom a fiat issues swears that he owes no debt to the petitioning creditor, and has committed no act of bankruptcy, but on the contrary is solvent, the Court will stay the advertisement; *à fortiori* when upon inspecting the proceedings the Court is of opinion that the requisites to support the commission have not been made out.—*Exp. Fletcher*, 327.

7. (*Answering affidavits.*) When a petition is in the paper for hearing on Monday, and the respondent files his affidavits on the Saturday previous, although the respondent may read them, yet the petitioner is entitled to time to answer them on payment of the costs of the day.—*Exp. Gladdish*, 330.

8. (*Fiat.*) Where the major part of the creditors and the witnesses to prove the requisites of the bankruptcy, as well as one of the bankrupts, resided in Northumberland and Durham, and the effects of the bankrupts were also in one or other of those counties, the fiat was ordered to be directed to commissioners in the country.—*Exp. Bolan*, 331.

9. (*Petition of rehearing.*) Although six months is the time limited by the practice of the Court for presenting a petition for rehearing, *semble*, that under special circumstances it may be dispensed with.—*Exp. White*, 334.

10. (*Affidavit.*) An affidavit, though not filed, may be read, upon an undertaking to file it.—*Exp. Baker*, 366.

11. (*Signing petition.*) A special order having been obtained for an agent to the petitioner, who was abroad, to sign the petition on his behalf, was discharged with costs, on the ground that it might have been done under the General Order of 12th of August 1809.—*Exp. Moore*, 369.

12. (*Election.*) Where a bankrupt petitions to supersede, and at the same time brings an action to try the validity of the bankruptcy, the Court will not compel him to elect which proceeding he will continue, but will order the petition to stand over until the result of the action is known. (*Exp. Price, Buck*, 230; *3 Madd.* 228.)—*Exp. Chambers*, 372.

13. (*Taxing.*) A petitioning creditor's bill was ordered to be taxed by one of the deputy registrars, objectionable charges having been allowed by the commissioners.—*Exp. Hattersley*, 373.

14. (*Exceptions.*) Where affidavits are referred to the registrar for scandal, and one of the parties means to except to this report, the exception must be taken immediately the registrar certifies.—*Exp. Williamson*, 382.

15. (*Prosecuting order.*) *Semble*, that when a petitioner obtains a conditional order of the Court, he is bound to prosecute such order, under peril of paying costs to the other party.—*Exp. Austen*, 384.

16. (*Bankrupt's last examination.*) Where from unavoidable accident the commissioners are prevented from meeting to take the bankrupt's last examination, the Court will appoint another day for that purpose.—*Exp. Watson*, 388.
17. (*Power of attorney.*) A power of attorney from a creditor residing abroad to sign the bankrupt's certificate, is sufficiently authenticated by the attestation of a notary public, without any affidavit to verify the signature.—*Exp. Myers*, 406.
18. (*Affidavit.*) A reference for scandal in an affidavit will be granted, even after the petition has been heard, but not a reference for impertinence. (*Exp. Williamson*, 1 D. & C. 529.)—*Exp. Williamson*, 414.
19. (*Conveyance by bankrupt.*) If the bankrupt refuses to join in the conveyance of any part of his estate, the Court will make an order for him to do so, under the statute 6 Geo. 4, c. 16, s. 78.—*Exp. Jackson*, 458.
20. (*Lapse of Time.*) After a lapse of twenty years, and the death of the petitioning creditor and the bankrupt, the Court will not entertain a petition for a supersedeas on the ground of fraud.—*Exp. Granger*, 489.

#### PRIVATE HEARING.

*Quere*, whether the Court has power to hear a matter in private: no rule on the subject now exists.—*In re Chambers*, 395.

#### PROMISSORY NOTE.

A bankrupt and eight other persons concerned in a joint undertaking, made a promissory note for the purpose of securing the repayment of a loan of money, which the bankrupt signed some days after the party who borrowed the money: Held, that no additional stamp was necessary, if the last signature was put before the money was advanced; or if the bankrupt had promised to sign the note before the advance of the money, notwithstanding it might not actually have been signed until afterwards.—*Exp. White*, 334.

#### PROOF.

1. (*Notice of dishonour.*) A. discounts for B., three bills drawn by B. on C., B. is declared a bankrupt, one of the bills becomes due before and the others after the bankruptcy; none of them are paid, and A. gives no notice to B. of their dishonour: Held, that A. could not prove the first bill, not having given notice of dishonour, but that he might prove the others, they having become due after the bankruptcy, and no return therefore being necessary.—*Exp. Solarte*, 361.
2. (*Bill.*) B. sends to A. five bills drawn by B. on C., receiving in return A.'s acceptances for the amount, which B. discounted with his own bankers, but which not being paid by A., (who was declared bankrupt before they became due,) were proved by the holders under a commission against B., A. having never negotiated the five bills sent him by B.: Held, that the assignees of A. could not prove under the commission against B. (*Sarnett v. Austin*, 4 Taunt. 201.)—S. C.

3. (*Collateral security.*) The trustees under the marriage settlement of a bankrupt advance him, on the security of his bond, the amount of the trust fund (being his wife's fortune,) for the purpose of being employed in his business; and one of the trustees afterwards enters into a parol agreement with the bankrupt and his partner, that the loan should be considered as a debt due from the partnership: Held, that the trustees had a right to prove both against the joint and separate estates, and to take their election from which they would receive dividends. (Exp. Jackson, 1 Ves. jun. 131; Exp. Williams, Buck, 13.)—*Exp. Kedie*, 321.
4. (*Joint or several.*) A testator indebted on bond devises his real estate to the bankrupt and two other trustees for payment of his debts. The creditor, after the testator's death, brings an action against the bankrupt and the other devisees, and recovers a joint judgment: Held, that he could not prove under the separate commission against the bankrupt, even for the purpose of voting in the choice of assignees.—*Exp. Pearse*, 451.

#### REPUTED OWNERSHIP.

1. W., a horse contractor, let a cart horse on hire to N., who retains it in his possession a twelvemonth previous to his bankruptcy: Held, that there being no proof of the horse ever having belonged to the bankrupt, and the evidence rebutting that presumption, it did not pass to the assignees.—*Exp. Wiggins*, 209.
2. The Court will not interfere by ordering the messenger to withdraw from the possession of goods which he has seized under the bankruptcy, in any case of reputed ownership.—*Exp. Hasling*, 389.

#### SOLICITOR.

Although the solicitor's bill has been paid, yet it will be ordered to be taxed on the application of the assignees, without any special reason being assigned for the taxation.—*Exp. Pickering*, 387.

#### UNCLAIMED DIVIDENDS.

1. The Court will not order unclaimed dividends to be distributed among the creditors, without ample notice having been given to the persons entitled; especially where a long period has elapsed before any dividend has been made. (Exp. Donaldson, 1 D. & C. 110.)—*Exp. Fedden*, 379.
2. *Semble*, that the unclaimed dividends of joint creditors ought to go to the joint creditors, and those of separate creditors to the separate creditors.—S. C.

#### WITNESS.

(*Bankrupt.*) On a petition by the owner of a horse let on hire to a bankrupt, for the redelivery of the horse, the bankrupt, on a *viva voce* examination, cannot be called for the respondents, he being an incompetent witness to increase the fund.—*Exp. Wiggins*, 269.

## LIST OF CASES.

## COMMON LAW.

Adams v. Grane, 1 C. & M. 380.....	Distress, 4
Aireton v. Davies, 9 Bing. 746 .....	Warrant of Attorney
Aldridge v. Harper, 10 Bing. 118.....	Replevin
Alston v. Underhill, 1 C. & M. 492.....	Bail, 4 ; Process, 2
Anderson v. Thomas, 9 Bing. 678.....	Pleading, 1
Apperley v. Bishop of Hereford, 9 Bing. 681 .....	Pleading, 2
Aspinall v. Wake, 10 Bing. 51.....	Executor and Administrator, 2
Bardons v. Selby (in error), 9 Bing. 756; 1 C. & M. 500 .....	Pleading, 4
Barlow v. Rhodes, 1 C. & M. 439 .....	Way
Bassett v. Dodgin, 10 Bing. 40.....	Bill of Exchange, 1
Bircham v. Creighton, 9 Bing. 11.....	Insolvent Debtors' Acts, 1
Blandy v. Webb, 3 Tyr. 235.....	Practice, 18
Blower v. Hollis, 1 C. & M. 393 .....	Evidence, 3
Bowyear v. Bowyear, 9 Bing. 670.....	Practice, 2
Brigstock v. Smith, 1 C. & M. 483 .....	Limitations, Statute of, 2
Brown v. Lord Granville, 10 Bing. 69 .....	Building
Bussey v. Storey, 4 B. & Ad. 98 .....	Toll, 1
Butcher v. Harrison, 4 B. & Ad. 129.....	Fraudulent Conveyance
Byfield v. Street, 10 Bing. 27 .....	Process, 1
Cadell v. Palmer, 10 Bing. 140 .....	Executory Devise
Casteline v. Mundy, 4 B. & Ad. 90 .....	Court of Error
Chalon v. Anderson, 3 Tyr. 237 .....	Interpleader Act, 3
Chapman v. Walton, 10 Bing. 57.....	Insurance
Cocks v. Nash, 9 Bing. 723.....	Practice, 5
Cohen v. Watson, 3 Tyr. 238 .....	Process, 3
Cook v. Clark, 4 B. & Ad. 19.....	Notice of Action
Cowper v. Godmond, 9 Bing. 748.....	Limitations, Statute of, 1
Cresfield v. Stanley, 4 B. & Ad. 87 .....	Bankruptcy, 2
Crump v. Adney, 1 C. & M. 355, 362.....	Arbitration, 2 ; Pleading, 6
De Begnis v. Armistead, 10 Bing. 107.....	Illegal Contract
Deacon v. Fuller, 1 C. & M. 349.....	Practice, 8
Dewhurst v. Pearson, 1 C. & M. 365.....	Arrest
Doe d. Gashell v. Roe, 3 Tyr. 84.....	Ejectment
—— Hickman v. Hickman, 4 B. & Ad. 56 .....	Copyhold
—— Jones v. Davies, 4 B. & Ad. 48.....	Devise, 1



Doe d. Phillips v. Evans, 1 C. & M. 450.....	Insolvent Debtors' Acts, 2
——— Thompson v. Lidiard, 4 B. & Ad. 131.....	Mortgage
Donaldson v. Williams, 1 C. & M. 345 .....	Master and Servant
Emery v. Mucklow, 10 Bing. 23 .....	Practice, 6
Fenton v. Logan, 9 Bing. 676.....	Distress, 2
Featherstonehaugh v. Keen, 1 C. & M. 495 .....	Attorney, 1
Forbes v. Gregory, 1 C. & M. 435 .....	Costs, 2
Gleadow v. Aitkin, 1 C. & M. 410.....	Evidence, 4
Gobby v. Dewes, 10 Bing. 112 .....	Rescous
Goodburne v. Bowman, 9 Bing. 667 .....	Costs, 1
Grattick v. Phillips, 9 Bing. 721 .....	Pleading, 3
Green v. Jacobs, 3 Tyr. 231 .....	Bail, 5
Groves v. Cowham, 10 Bing. 5 .....	Sheriff, 1
Hail v. Mierris, 3 Tyr. 238 .....	Practice, 19
Hawkins v. Hawkins, 9 Bing. 765.....	Remainder
Hill v. Mould, 3 Tyrw. 162 .....	Practice, 15
Hodges v. Lord Lichfield, 9 Bing. 713 .....	Practice, 4
Holland v. Bird, 9 Bing. 15.....	Distress, 3
Hover v. Ipp, 4 B. & Ad. 78 .....	Bankruptcy, 1
Huntley v. Sanderson, 1 C. & M. 467 .....	Bill of Exchange, 3
Hutchison v. Lowndes, 4 B. & Ad. 118 .....	Commitment
Ingleby v. Swift, 10 Bing. 84 .....	Bond, 1
Isaac v. Spilsbury, 10 Bing. 3 .....	Interpleader Act, 1
Isaacs v. Goodman, 1 C. & M. 494 .....	Practice, 12
Keys v. Smith, 10 Bing. 1 .....	Venue
Lawson v. Case, 1 C. & M. 481 .....	Affidavit, 1
Lawson v. Robinson, 1 C. & M. 499 .....	Practice, 14
Linley v. Clarkson, 1 C. & M. 436.....	Stamp, 2
Lloyd v. Heathcote, 1 C. & M. 336 .....	Stamp, 1
Maberley v. Sheppard, 10 Bing. 99 .....	Frauds, Statute of
Mather v. Thomas, 10 Bing. 44 .....	Devise, 2
Meller v. Palfreyman, 4 B. & Ad. 146 .....	Bail, 1
Miller v. Spurrs, 2 M. & S. 730 .....	Practice, 21
Moore v. Jones, 3 Tyrw. 351 .....	Courts of Request's Acts
Morgan v. Birnie, 9 Bing. 672 .....	Condition Precedent
Mould v. Murphy, 1 C. & M. 495 .....	Practice, 13
Munk v. Clarke, 10 Bing. 102 .....	Bankruptcy, 3
Nasker v. Jarman, 1 C. & M. 408 .....	Practice, 10
Nelson v. Slack, 2 Moo. & S. 820 .....	Attorney, 2
Parks v. Edge, 1 C. & M. 429 .....	Amendment; Bill of Exchange, 2
Pennington v. Healey, 1 C. & M. 402.....	Executor and Administrator, 3
Percival v. Hodley, 3 Tyrw. 217, n. ....	Affidavit, 2

Perkins v. Benton, 3 Tyrw. 51 .....	Interpleader Act, 2
Perriman v. Steggall, 9 Bing. 679 .....	Arbitration, 1
Phillips v. Evans, 1 C. & M. 450 .....	Insolvent Debtors' Acts, 2
Plevin v. Henshall, 10 Bing. 24 .....	Trover
Regulæ Generales .....	Page 426
Rex v. Adams, 4 B. & Ad. 61 .....	Poor Rate
— v. Athea, Moo. C. C. R. 329 .....	Indictment, 5
— v. Ball, Moo. C. C. R. 330, 333 .....	Poaching and Murder, 1
— v. Briggs, Moo. C. C. R. 318 .....	Wounding, 3
— v. Burrows, Moo. C. C. R. 274 .....	Burglary and Housebreaking, 1
— v. Carney, Moo. C. C. R. 351 .....	Forgery, 5
— v. Chalmers, Moo. C. C. R. 352 .....	Indictment, 6
— v. Channen, Moo. C. C. R. 374 .....	Quaker
— v. Cox, Moo. C. C. R. 337 .....	Rape
— v. Cullen, Moo. C. C. R. 300 .....	Forgery, 4
— v. Dade, Moo. C. C. R. 307 .....	Forgery, 2
— v. Deeley, Moo. C. C. R. 303 .....	Indictment, 3
— v. Ellison, Moo. C. C. R. 336 .....	Arson, 1
— v. Folkes, Moo. C. C. R. 354 .....	Principal and Accessory, 3
— v. Harris, Moo. C. C. R. 338 .....	Evidence, 5
— v. Hood, Moo. C. C. R. 281 .....	Warrant of Apprehension
— v. Hughes, Moo. C. C. R. 370 .....	Embezzlement, 3
— v. Kirkwood, Moo. C. C. R. 311 .....	Forgery, 3
— v. Lloyd, 4 B. & Ad. 135 .....	Judgment
— v. M'Namee, Moo. C. C. R. 368 .....	Larceny, 2
— v. Madden, Moo. C. C. R. 277 .....	Indictment, 1
— v. Mather, Moo. C. C. R. 291 .....	Forgery, 1
— v. Morley, Moo. C. C. R. 343 .....	Embezzlement, 2
— v. Murray, Moo. C. C. R. 276 .....	Embezzlement, 1
— v. Patteson, 4 B. & Ad. 9 .....	Corporation, 1, 2 ; County Treasurer
— v. Payne, Moo. C. C. R. 378 .....	Poaching, 2
— v. Pease, 4 B. & Ad. 30 .....	Nuisance
— v. Philp, Moo. C. C. R. 263 .....	Ship
— v. Pearson, Moo. C. C. R. ....	Indictment, 4
— v. Prowes, Moo. C. C. R. 349 .....	Larceny, 1
— v. Reckspear, Moo. C. C. R. 342 .....	Rape
— v. Robinson, Moo. C. C. R. 327 .....	Burglary and Housebreaking, 3
— v. Russell, Moo. C. C. R. 356 .....	Burglary and Housebreaking, 2 ; Principal and Accessory, 4 ; Felo de se
— v. Senior, Moo. C. C. R. 346 .....	Manslaughter
— v. Sheriff of Middlesex, 1 C. & M. 482 .....	Bail, 3
— v. Smith, Moo. C. C. R. 289, 314 .....	Husband and Wife, 1 ; Stamp, 3
— v. Solomons, Moo. C. C. R. 292 .....	Principal and Accessory
— v. Thompson, 3 Tyrw. 5 .....	Estreats
— v. Treharne, Moo. C. C. R. 298 .....	Indictment, 2
— v. Turner, Moo. C. C. R. 347 .....	Principal and Accessory, 2
— v. Wallis, Moo. C. C. R. 344 .....	Indictment, 7
— v. Warner, Moo. C. C. R. 380 .....	Murder, 3
— v. Willis, Moo. C. C. R. 375 .....	Husband and Wife, 2
— v. Wood, Moo. C. C. R. 278 .....	Wounding, 1
— v. Woodward, Moo. C. C. 323 .....	Arson, 2 ; Indictment, 8

Rex v. Withers, Moo. C. C. R. 294 .....	Wounding, 2
— v. Woolmer, Moo. C. C. R. 334 .....	Murder, 2
Reynard v. Robinson, 9 Bing. 717.....	Insolvent Debtors' Acts, 3
Riddle v. Jenner, 10 Bing. 29 .....	Dower
Ridley v. Weston, 2 Moo. & S. 724 .....	Process, 4
Roots v. Lord Dormer, 4 B. & Ad. 77 .....	Auction
Roper v. Sheasby, 1 C. & M. 496 .....	Costs, 3
Sabine v. Field, 1 C. & M. 466 .....	Practice, 11
Sarjeant v. Cowan, 1 C. & M. 491 .....	Sheriff, 2
Siddall v. Rawcliffe, 1 C. & M. 487 .....	Promissory note
Smith v. Bond, 10 Bing. 125 .....	Bond, 2
— v. Escudier, 3 Tyrw. 219 .....	Practice, 16
— v. Stephens, 3 Tyr. 219 .....	Practice, 17
Smyth v. Latham, 9 Bing. 692.....	Office
Spiers v. Morris, 9 Bing. 687 .....	Evidence, 1 ; Practice, 3
Stammers v. Yearsley, 10 Bing. 35 .....	Pleading, 5
Storr v. Bowles, 4 B. & Ad. 112 .....	Practice, 1
Sturch v. Clarke, 4 B. & Ad. 113 .....	Distress, 1
Sweet v. Archbold, 10 Bing. 133 .....	Copyright
Sylvester v. Anthony, 9 Bing. 746.....	Evidence, 2
Tenny v. Jones, 10 Bing. 75.....	Presumption
Thomas v. Thomas 2 M. & S. 730 .....	Practice, 20
Twynning, demandant, 10 Bing. 65 .....	Practice, 7
Williams v. Holland, 10 Bing. 112 .....	Action on the Case
Witham Navigation Company v. Padley, 4 B. & Ad. 69.....	Highway Acts
Woolley v. Sloper, 9 Bing. 754 .....	Executor and Administrator
Woosnam v. Price, 1 C. & M. 352 .....	Bail, 2 ; Practice, 9
Wright v. Bruister, 4 B. & Ad. 116 .....	Toll, 2

## EQUITY.

Adamson v. Evitt, R. & M. 66 .....	Annuity
Alexander v. Duke of Wellington, R. & M. 35 .....	Military Prize
Attorney-General v. Sibthorpe, R. & M. 107 .....	Will, 1
Bartleman v. Murchison, R. & M. 136 .....	Will, 3
Barnsdale v. Lowe, R. & M. 142 .....	Practice, 6
Brook v. Smith, R. & M. 73 .....	Infant Heir, 1
Brown v. Pocock, R. & M. 210 .....	Husband and Wife, 6
Browne v. Blount, R. & M. 83 .....	Practice, 2
Chapman v. Tennant, R. & M. 74 .....	Infant Heir, 2
Davis v. Battine, R. & M. 76 .....	Mortgage
Devon Peerage Claim, Bl. 220 .....	Peerage
Durante v. Moore, R. & M. 33 .....	Practice, 1
Fenner v. Taylor, R. & M. 190 .....	Husband and Wife, 3
Gronow v. Edwards, R. & M. 102 .....	Tithes, 1, 2, 3
Handfield v. Wildes, R. & M. 91 .....	Practice, 4
Hopkins v. Myall, R. & M. 86 .....	Power, 2
Jones v. Salter, R. & M. 208 .....	Husband and Wife, 4
Kendall v. Beckett, R. & M. 89 .....	Practice, 3 ; Specific Performance
Kidney v. Cockburn, R. & M. 167 .....	Evidence, 2
Moneypenny v. Briston, R. & M. 117 .....	Account; Title; Will, 2
Monkton v. Attorney-General, R. & M. 147 .....	Evidence, 1
Moulton v. Attorney-General, R. & M. 147 .....	Practice, 1
Pearson v. Stephen, Bl. 204 .....	Will, 4
Shewen v. Vanderhorst, R. & M. 75 .....	Executor
Stanton v. Hall, R. & M. 175 .....	Husband and Wife, 1
Tatham v. Wright, R. & M. 131 .....	New Trial ; Costs
Tyler v. Lake, R. & M. 183 .....	Husband and Wife, 2
Walsh v. Wallinger, R. & M. 81 .....	Power, 2
Weaver v. Maule, R. & M. 97 .....	Copyhold
Woodmeston v. Walker, R. & M. 197 .....	Husband and Wife, 5
Wright v. Green, R. & M. 93 .....	Practice, 5

**BANKRUPTCY.**

Ashwell, Exp. D. & C. 281 .....	Guarantee
Austen, Exp. D. & C. 284.....	Practice, 15
Baker, Exp. D. & C. 362, 366 .....	Fiat, 1 ; Practice, 10
Bignold, Exp. D. & C. 398 .....	Mortgage, 4
Bolan, Exp. D. & C. 331 .....	Practice, 8
Bramston, Exp. D. & C. 375.....	Assignee, 3
Chambers, Exp. D. & C. 372.....	Practice, 12
Christie, Exp. D. & C. 431 .....	New Trial
Coombs, Exp. D. & C. 319.....	Assignee, 2
Elsee, Exp. D. & C. 332 .....	Costs
Fedden, Exp. D. & C. 379 .....	Unclaimed Dividends, 1, 2
Fletcher, Exp. D. & C. 327, 374.....	Fiat, 2 ; Practice, 6
Gladdish, Exp. D. & C. 330 .....	Practice, 7
Granger, Exp. D. & C. 489 .....	Practice, 20
Grylls, Exp. D. & C. 290.....	Assignee, 1 ; Practice, 3
Hardy, Exp. D. & C. 393.....	Mortgage, 3
Hasling, Exp. D. & C. 389 .....	Reputed Ownership, 2
Hattersley, Exp. D. & C. 373.....	Practice, 13
Hinton, Exp. D. & C. 407 .....	Appeal, 1, 2
In re Chambers, D. & C. 395 .....	Private Hearing
In the matter of Falk, D. & C. 415 .....	Examination
In the matter of Fletcher, D. & C. 317 .....	Practice, 5
Jackson, Exp. D. & C. 458 .....	Practice, 19
Kedie, Exp. D. & C. 321 .....	Proof, 3
Lees, Exp. D. & C. 360 .....	Mortgage, 2
Moore, Exp. D. & C. 369 .....	Practice, 11
Myers, Exp. D. & C. 406.....	Practice, 17
Orgill, Exp. D. & C. 413.....	Trustee, 5
Pearse, Exp. D. & C. 451 .....	Proof, 4
Pickering, Exp. D. & C. 387 .....	Solicitor

Ryland, Exp. D. & C. 392 .....	Assignees, 4
Shadbolt, Exp. D. & C. 286 .....	Practice, 1, 2
Smith, Exp. D. & C. 271 .....	Mortgage, 1
Solarte, Exp. D. & C. 361 .....	Proof, 1, 2
Stright, Exp. D. & C. 314 .....	Policy
Watson, Exp. D. & C. 388 .....	Practice, 16
White, Exp. D. & C. 334 .....	Practice ; Promissory note
Wiggins, Exp. D. & C. 209 .....	Reputed Ownership ; Witness
Williamson, Exp. D. & C. 182, 317, 414 .....	Practice, 4 ; Practice, 14, 18

# ABSTRACT OF PUBLIC GENERAL STATUTES.

## 3 & 4 WILLIAM IV.—(*continued.*)

**CAP. 21.**—An Act to suspend, until the end of the next Session of Parliament, the making of Lists, and the Ballots and Enrolments for the Militia of the United Kingdom. [28th June, 1833.]

**CAP. 22.**—An Act to amend the laws relating to Sewers. [28th June, 1833.]

**CAP. 23.**—An Act to reduce the Stamp Duties on Advertisements, and on certain Sea Insurances; to repeal the Stamp Duties on Pamphlets, and on Receipts for sums under Five Pounds; and to exempt Insurances on Farming Stock from Stamp Duties. [28th June, 1833.]

**S. 1.** The duties granted in Great Britain by 55 Geo. 3, c. 184, on certain sea insurances, and on receipts for sums under five pounds; the duties granted in Great Britain by the same act, on pamphlets and advertisements; and the duties granted in Ireland by 56 Geo. 3, c. 56, on the same articles, repealed, except as to arrears.

**S. 2.** Grant of new duties on advertisements and sea insurances, mentioned in the schedule annexed to the act, (1*s.* 6*d.* on every advertisement in Great Britain, 1*s.* in Ireland).

**S. 3.** Copies of all pamphlets, periodicals, &c. containing advertisements, to be sent to the head office for stamps within six days after publication.

**S. 4.** Powers of former acts to be in force and put in execution with regard to the duties hereby granted.

**S. 5.** Insurances on agricultural produce, farming stock, and implements of husbandry, exempted from stamp duty.

**S. 6.** Separate accounts of such insurances to be rendered quarterly to the commissioners of stamps.

**S. 7.** Act may be altered this session.

**CAP. 24.**—An Act to amend an Act of the Tenth Year of his late Majesty, for regulating the Reduction of the National Debt. [9th July, 1833.]

**CAP. 25.**—An Act for raising the sum of Fifteen Millions, Seven Hundred Fifty-two Thousand, Six Hundred and Fifty Pounds, by Exchequer Bills, for the Service of the Year one thousand eight hundred and thirty-three. [9th July, 1833.]

**CAP. 26.**—An Act to repeal so much of an Act passed in the Parliament of Ireland, in the thirty-fourth year of his Majesty King George the Third, as imposes Fines on the Masters of Vessels lying in the River Liffey, for having Fires on board. [28th June, 1833.]

**CAP. 27.**—An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto. [24th July, 1833.]



S. 1. Defines the sense in which certain words are to be construed in the act.

S. 2. After 31st December, 1833, no person shall make an entry or distress, or bring an action, to recover land or rent, but within twenty years after the right first accrued to some person under whom he claims, or to himself.

S. 3. Such right shall be deemed to have first accrued,—where the party shall have been in possession or receipt of rent, and having been so shall have been dispossessed or have discontinued such possession or receipt,—at the time of such dispossession, &c. or at the last receipt of rent; and when the party claims the estate or interest of a deceased person, who continued in possession to his death, and was the last person entitled who had been in possession, &c.—at the time of such death; and when the party claims in respect of an estate or interest granted, &c. by any instrument other than a will, under which no person has been in possession, &c.—at the time when the party claiming, or the person through whom he claims, became entitled to possession, &c. by virtue of such instrument; and when the estate or interest claimed shall have been any *future* estate or interest, in respect of which no person has obtained possession or receipt of rent or profits,—at the time when it became an estate or interest in possession; and when the party claims by reason of any forfeiture or breach of condition,—at the time of the forfeiture incurred or condition broken.

S. 4. When the right upon a forfeiture or breach of condition shall have accrued in respect of an estate in remainder or reversion, and it has not been taken advantage of, the right shall be deemed to have accrued anew when the estate became an estate in possession.

S. 5. The same provision in favour of a reversioner, though he may have been in possession, &c. previously to the creation of the intermediate estate.

S. 5. Administrators may claim as if appointed immediately on the death of the intestate.

S. 6. Where any person is in possession or receipt of land or rent as tenant at will, the right of the party entitled subject thereto, shall be deemed to have accrued either at the expiration of the tenancy, or one year after its commencement; but no mortgagor or cestui que trust to be considered a tenant at will to his mortgagee or trustee.

S. 7. In case of a tenancy from year to year, or other period, without lease in writing, the right shall accrue at the end of the *first* year or other period, or at the last receipt of rent, which shall last happen.

S. 8. In case of a lease in writing reserving 20s. or upwards, where the rent shall have been received by some person wrongfully claiming the reversion expectant on such lease, and no payment shall have been afterwards made to the person rightfully entitled, the right of the person entitled subject to the lease, to make an entry, &c. shall be deemed to have accrued at the time of the first wrongful receipt of rent, and not upon the determination of the lease.

S. 10. No mere entry to be deemed a possession of land.

S. 11. No continual or other claim to preserve the right.

S. 12. The possession of a coparcener, joint tenant, or tenant in common, of more than his own share, (unless it was for the benefit of the other parties entitled,) not to be deemed the possession of the others.

S. 13. The possession of a younger brother or other relation, not to be deemed the possession of the party entitled as heir.

S. 14. An acknowledgment of title in writing, given to the party entitled or his agent, signed by the person in possession or receipt of land or rent, to be equivalent to possession or receipt by the former; and his right to accrue at the time when the last of such acknowledgments was given.

S. 15. Where no such acknowledgment shall have been given before the passing of this act, and at the time of its passing the possession was not adverse to the right of the party claiming, his right not to be barred until five years after the passing of the act.

S. 16. Where the party entitled was under the disability of infancy, coverture, lunacy, or absence beyond seas, when the right first accrued, an additional period of ten years allowed after his death or the ceasing of the disability.

S. 17. But in no case shall any entry, distress, or action be made or brought after forty years.

S. 18. Where a party so under disability shall have died without its having ceased, no further period beyond the additional ten years shall be allowed by reason of the disability of any other person.

S. 19. No part of the United Kingdom, nor the Isles of Man, Guernsey, Jersey, Alderney, or Sark, to be deemed beyond seas.

S. 20. When the right of any person, who was entitled to an estate in possession, has become barred, and he shall also have been entitled at any time during the same period to a future estate in the same land or rent, that also shall be barred, unless in the mean time the land or rent shall have been recovered by some person entitled to an estate or right subsequent to, or in defeasance of, such estate in possession.

S. 21. When the right of a tenant in tail is barred, remaindermen, whom he might have barred, shall not recover.

S. 22. Possession adverse to a tenant in tail, shall run on against remaindermen whom he might have barred.

S. 23. When tenant in tail shall have made an assurance which does not operate to bar the remainders, and any person (other than a remainderman) shall continue in possession under such assurance for twenty years after the time at which, if then executed, it *would* have barred the remainders, such assurance shall, at the end of those twenty years, be effectual to bar the remainders.

S. 24. After 31st December, 1833, no person shall bring any suit in equity to recover land or rent but within the period during which under this act he might have sued at law.

S. 25. In case of an express trust, the right of the cestui que trust to

recover against the trustee, or any person claiming under him, shall not be deemed to have accrued until a conveyance to a purchaser for valuable consideration, and then only as against the purchaser and parties claiming under him.

S. 26. In cases of concealed fraud; the right to sue in equity for land or rent of which the party has been deprived by the fraud, shall only be deemed to have accrued at the time when the fraud might with reasonable diligence have been discovered. But this is not to apply as against an innocent purchaser for valuable consideration.

S. 27. Saves the jurisdiction of equity to refuse relief, on the ground of acquiescence or otherwise.

S. 28. Mortgagor to be barred from suing to redeem, at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment given in writing, signed by him, of the mortgagor's title; such acknowledgment, if given to one of several mortgagors, or parties claiming through them, to be effectual in favour of all; but an acknowledgment by one or more of several mortgagees, &c. to be effectual only as against those signing it, and the parties claiming through or after them; and where the parties signing are entitled to a divided part of the land or rent in mortgage, and not to any ascertained part of the mortgage money, the mortgagor shall be entitled to redeem as against them, on payment, with interest, of such part of the money as bears to the whole the same proportion as the value of their divided part of the land or rent to the whole.

S. 29. Spiritual or eleemosynary corporations sole allowed two incumbencies and six years, or sixty years, and no more, in which to make entry, or distress, or bring actions to recover land or rent, after the right first accrued.

S. 30. The period for recovering an advowson limited to three successive adverse incumbencies, or sixty years.

S. 31. Incumbencies, after lapse to the crown or the ordinary, to be reckoned in that period; but not incumbencies after promotions to bishoprics.

S. 32. A person claiming a right to an advowson, by virtue of an interest which the owner of an estate tail might have barred, shall be deemed to be a person claiming through the tenant in tail, and be barred accordingly.

S. 33. After 31st December, 1833, no advowson shall in any case be recovered after 100 years' adverse enjoyment, unless there has been a subsequent possession on a presentation by the party claiming, or under his title.

S. 34. At the determination of the period limited by the act, the right of the party out of possession shall be extinguished.

S. 35. Receipt of rent from a lessee, to be deemed as against him and persons claiming under him receipt of profits.

S. 36. All real and mixed actions abolished after 31st December, 1834, except for dower, quare impedit, and ejectment.

S. 37. When, on that day, any person who shall not have a right of

entry to any land, shall be entitled to a real action in respect of it, it may be brought until 1st June, 1835, in case it might have been brought independently of this act, although the twenty years may have expired.

S. 38. When, on 1st June 1835, any person whose right of entry in land shall have been taken away by descent cast, discontinuance, or warranty, might bring a real action; he may bring it after that day, but only within the period during which, under this act, he might have made an entry, if his right of entry had not been so taken away.

S. 39. No descent cast, discontinuance, or warranty, made after 31st December, 1833, to toll a right of entry or action.

S. 40. After 31st December, 1833, money payable out of land or rent, and legacies, to be deemed satisfied at the end of twenty years after a present right to receive them shall have accrued to a person capable of giving a discharge or release, unless part of principal or interest have been paid, or an acknowledgment in writing, signed by the party or his agent, given in the mean time; and the right limited to twenty years after such payment or acknowledgment last made.

S. 41. After 31st December, 1833, no further arrears of dower than for six years to be recoverable.

S. 42. Nor any further arrears of rent, or interest of money payable out of land or rent. But where a prior incumbrancer has been in possession or receipt of profits, within a year next before a suit by a subsequent incumbrancer, the latter may recover the arrears of interest for the whole time that the former was in possession, &c.

S. 43. The act to extend to suits in the spiritual courts.

S. 44. Not to extend to Scotland, or to advowsons in Ireland.

S. 45. Act may be altered this session.

CAP. 28.—An Act to repeal an Act of the Thirteenth Year of his Majesty King George the First, for the better Regulation of the Woollen Trade.

[24th July, 1833.]

CAP. 29.—An Act to make further Provisions with respect to the Payment of Pensions granted for Service in the Royal Artillery, Engineers, and other Military Corps, under the controul of the Master General and Board of Ordnance, and with respect to Deductions hereafter to be made from Pensions granted by the Commissioners of Chelsea Hospital.

[24th July, 1833.]

CAP. 30.—An Act to exempt from Poor and Church Rates all Churches, Chapels, and other Places of Religious Worship. [24th July, 1833.]

S. 1. No person shall be liable to be rated to church or poor rate for places or parts of them exclusively appropriated to public religious worship, and (in the case of places of dissenting worship) duly certified according to law; but the exemption not to apply to parts of places not so exclusively appropriated, and from which any person shall receive rent or derive profit.

S. 2. Persons not to be liable to rates because part of premises may be used for Sunday or infant schools, or for the charitable education of the poor.

**CAP. 31.**—An Act to enable the Election of Officers of Corporations and other Public Companies now required to be held on the Lord's Day, to be held on the Saturday next preceding, or on the Monday next ensuing.

[24th July, 1833.]

**CAP. 32.**—An Act to amend the several Acts authorizing advances for carrying on Public Works.

[24th July, 1833.]

**CAP. 33.**—An Act to amend three Acts passed for maintaining and keeping in repair the Military and Parliamentary Roads and Bridges in the Highlands of Scotland; and to improve certain Lines of Communication in the counties of Inverness and Ross.

[24th July, 1833.]

**CAP. 34.**—An Act to continue, until the fifth day of April one thousand eight hundred and thirty-five, Compositions for the Assessed Taxes.

[24th July, 1833.]

**CAP. 35.**—An Act to remedy certain Defects as to the Recovery of Rates and Assessments made by Commissioners and other Persons under divers Inclosure and Drainage Acts, after the execution of the final Awards of the Commissioners.

[24th July, 1833.]

**CAP. 36.**—An Act to diminish the Expense and Inconvenience of Commissions in the nature of Writs de Lunatico Inquirendo; and to provide for the better Care and Treatment of Idiots, Lunatics, and Persons of unsound Mind, found such by Inquisition.

[24th July, 1833.]

S. 1. Empowers the Lord Chancellor, Lord Keeper, &c. to cause commissions of lunacy to be directed to any one or more persons, who shall have power to make inquisition thereon, and all the other powers hitherto possessed by the three or more; and such commissions shall be valid to all intents and purposes.

S. 2. The Lord Chancellor, &c. may, by instrument under his hand and seal, appoint three persons (two physicians and a barrister of five years' standing) as visitors for superintending and reporting upon the care and treatment of lunatics found such by inquisition. Salaries 500*l.* per annum to the medical visitors, and 300*l.* per annum to the other, with allowances for travelling expenses.

S. 3. Lunatics to be visited at least once a year by one of the medical visitors.

S. 4. Visitors to report to the Lord Chancellor, &c. Reports to be kept secret; and to be destroyed on the death of the patient, and on the supersedeas of the commission.

S. 5. In case of death, or removal; or refusal or inability to act, the Lord Chancellor, &c. may appoint other visitors.

S. 6. Persons having had, within two years before, any interest in any house licensed for the reception of insane persons, excluded from acting or continuing to act as visitors.

S. 7. The Lord Chancellor, &c. may appoint a secretary to the visitors, with a salary of 300*l.* a year.

S. 8. A fund for payment of salaries and expenses to be raised by a per centage on the incomes of the insane persons, and paid by their committee or receivers into the Bank of England.

S. 9. Directs them so to pay within one calendar month after notice from the visitor's secretary.

S. 10. Masters in Chancery to certify the incomes of insane persons within two months after the passing of the act, or after the appointment of committees, or within twelve months after the inquisition, where no committees are appointed.

S. 11. No payment to be made out of the fund in the Bank, except by checks signed by the Lord Chancellor, &c.

S. 12. Accounts to be made out yearly by the secretary, audited by a Master in Chancery, and filed in the office of the secretary of bankrupts.

CAP. 37.—An Act to alter and amend the Laws relating to the Temporalities of the Church in Ireland. [14th August, 1833.]

CAP. 38.—An Act to extend to the Twenty-first day of January, one thousand eight hundred and thirty-four, and to the end of the then next Session of Parliament, the Time for carrying into execution an Act of the First and Second Years of His present Majesty, for ascertaining the Boundaries of the Forest of Dean, and for inquiring into the Rights and Privileges claimed by Free Miners of the Hundred of St. Briavels, and for other purposes. [14th August, 1833.]

CAP. 39.—An Act to reduce certain of the Duties on Dwelling-houses, and to repeal other Duties of Assessed Taxes. [14th August, 1833.]

S. 1. Reciting 48 Geo. 3, c. 55; and 4 Geo. 4, c. 11, exempts, after 5th April 1833, occupiers of dwelling-houses, residing only therein, and carrying on trade there, (where the shop or warehouse falls within the relief from window duties given by 4 Geo. 4,) from a moiety of the house duty, provided their names be legibly painted on the front of the house.

S. 2. Reduces the duties on inhabited houses, rented at from 10*l.* to 18*l.*, not falling within the preceding exemption.

S. 3. The exemption in s. 1; to apply to licensed victuallers.

S. 4. The duties of assessed taxes on riders or travellers, clerks, book or office keepers, stewards, bailiffs, overseers, managers, &c. shopmen, warehousemen, porters, cellarmen, and groom; stable boys or helpers solely employed by livery stable keepers, horse dealers or post-masters, repealed from 5th April 1833; and where a licensed victualler employs one male person only to carry out liquors, he shall be deemed a porter within the exemption, though occasionally employed to wait on guests.

S. 5. Duties on carriages imposed by 2 & 3 Will. 4, c. 82, wholly repealed from 5th April 1833. Exemption extended also to other descriptions of taxed carts.

S. 6. Exemption in favour of horses employed by market gardeners.

S. 7. Exemption for dogs solely employed by shepherds in the care of flocks in which they have a direct interest, the returns being duly made and exemption claimed.

S. 8. The rules and provisions of former acts extended to this act, except as herein varied.

S. 9. Act may be altered this session.

CAP. 40.—An Act to repeal certain Acts relating to the Removal of poor

Persons born in Scotland and Ireland, and chargeable to Parishes in England, and to make other provisions in lieu thereof, until the first day of May 1836, and to the end of the then next Session of Parliament.

[14th August, 1833.]

S. 1. So much of 17 G. 2, c. 5; 59 G. 3, c. 12; and 5 G. 4, c. 83, as relates to the removal of poor persons born in Scotland and Ireland, repealed from the first day of January 1834.

S. 2. From the first day of January 1834, two justices are empowered, on the complaint of churchwardens and overseers, to inquire into the settlement and order the removal of chargeable poor born in Scotland or Ireland, the isles of Man or Scilly, and not having gained a settlement in England, by sea or land, at the expense of the complaining parish, to be repaid out of the county rate.

S. 3 and 4. Justices in quarter sessions to direct in what manner the removal shall be made, and to make orders and rules for carrying the provisions of the Act into effect.

S. 5. Mode of repayment out of the county rate.

S. 6. Directs how expenses are to be defrayed of removing poor persons within London; and s. 7, where the parish is within any city, borough, &c., not contributing to the county rate.

S. 7. Act to continue in force till the first day of May 1836, and to the end of the next session of Parliament.

**CAP. 41.—An Act for the better Administration of Justice in His Majesty's Privy Council.**

[14th August, 1833.]

S. 1. The President of the Council, the Lord Chancellor, and such members of the Privy Council as shall hold the offices following, viz. Lord-Keeper or First Commissioner of the Great Seal, Chief Justice or Judge of K. B., Master of the Rolls, Chief Justice or Judge of C. P., Chief Baron or Baron of the Exchequer, Judge of the Prerogative Court, Judge of the Court of Admiralty, and Chief Judge of the Court of Bankruptcy; and also all Privy Councillors who shall have been Lord President or Chancellor, or held any of the above offices; shall form a committee, to be styled "The Judicial Committee of the Privy Council:" Provided that the crown may appoint any two other Privy Councillors to be members of such committee.

S. 2. After the first day of June 1833, Appeals from Admiralty or Vice-Admiralty courts abroad to be made to the King in council, instead of the Court of Admiralty or Prize Commissioners.

S. 3 and 4. After the passing of this Act, appeals to the King in council, and such other matters as he shall think fit, to be referred to the Judicial Committee to report thereon.

S. 5. No matter to be heard but in the presence of four members at least, and no report to be made unless the majority of those present concur; nothing herein contained to prevent His Majesty from summoning other members of the Privy Council to attend the meetings of the committee.



S. 6. In case the King require the attendance of any judge of the superior courts, the other judges of the court to which he belongs are to make arrangements with regard to the business of the court, &c.

S. 7 and 8. The committee may examine witnesses *viva voce*, or direct their depositions to be taken in writing by the registrar, who is to have the same power as an examiner of the Court of Chancery or of the Ecclesiastical courts: and may order any witnesses to be examined or re-examined to particular facts, and may remit causes for rehearing, and then admit evidence before rejected, or, *vice versa*, as the King in council may direct.

S. 9. Witnesses to be examined on oath (or affirmation) and to be liable to the punishment of perjury.

S. 10 to 13. Empower the committee to direct issues at common law for the trial of any fact, to direct depositions to be read at the trial, to make orders as to the admission of evidence, as in the Court of Chancery, and to direct new trials of issues.

S. 14. Extends to the committee the powers of 13 G. 3, c. 63, and 1 W. 4, c. 22, with regard to examination of witnesses by commission on interrogatories.

S. 15, 16. Costs are to be in the discretion of the committee, and their decrees are to be enrolled.

S. 17. Empowers them to refer matters to the registrar, in like manner as to a Master in Chancery; and s. 18 vests the appointment of the registrar in the crown.

S. 19. Attendance of witnesses, production of documents, &c., to be compelled by subpoena issued by the President; and persons disobeying it to be liable to the same penalties as for contempt in K. B.

S. 20. Appeals to be made within the time now limited by law or usage, where any exists, otherwise within such time as shall be ordered by the King in council, who may also (subject to the rights of the colonies) alter any usage as to the time of appealing.

S. 21. Decrees on appeals from courts abroad to be carried into effect by them in such manner as the King in council shall direct: Proviso, that nothing in the Act shall abridge the power of the Privy Council, except as expressly altered.

S. 22 to 24. Contain regulations as to appeals from the courts in the East Indies.

S. 25 and 27. Empower the King, by warrant under the sign manual, to appoint a Baron of the Exchequer to sit in equity during the absence of the Chief Baron in the performance of judicial duties elsewhere.

S. 26. Enables two judges of the Court of Bankruptcy to form a Court of Review during the absence of the chief judge in the Privy Council.

S. 28. Gives the judicial committee the same power of compelling appearances, and punishing contempts, and to the King in council the same power of enforcing its decrees, as are exercised by the Court of Chancery or King's Bench, or are given to the Ecclesiastical Courts by 2 & 3 W. 4, c. 93.

S. 29. The registrar of the Court of Admiralty may attend the hearing of all cases and do all acts, which but for this Act he would have attended and done.

S. 30. Two retired judges of the colonial courts may be appointed by the King to attend the sittings of the committee, and to receive an allowance of 400*l.* a year.

S. 31. Saves the right of the crown to accede to treaties appointing certain persons to hear prize appeals.

CAP. 42.—An Act for the further Amendment of the Law, and the better advancement of Justice. [14th August, 1832.]

S. 1. Any eight or more judges of the superior courts of common law empowered, by rule or order, in term or vacation, within five years after this Act takes effect, to make such alterations in the mode of pleading, and of entering and transcribing pleadings, judgments, and other proceedings, and such regulations as to costs, &c., as seem to them expedient; such rules, &c. to be laid before both Houses of Parliament immediately, if sitting, or else within five days after their meeting, and not to have effect till six weeks afterwards; and then to be of the like force and effect as if their provisions had been enacted by Parliament: Provided that no such rule, &c. shall deprive any person of the power of pleading the general issue and giving the special matter in evidence.

S. 2. Actions of trespass or case may be brought by executors and administrators for any injury to the real estate of the deceased, committed within six calendar months before his death, so as they be brought within a year afterwards; and also against executors and administrators for any wrong committed by the deceased within six months before his death to real or personal property, so as they be brought within six calendar months after the executors or administrators have taken upon themselves the administration of the effects: the damages to be payable in like order of administration as simple contract debts.

S. 3. Actions of debt for rent on indenture of demise, covenant or debt on bond or other specialty, debt on *sci. fa.* on a recognizance, debt on an award on a parol submission, or for any copyhold fine, or for an escape, or for money levied on a *fi. fa.*, to be brought, the three first within ten years after the end of this session of Parliament, or twenty years after the cause of action, and the four last within three years after this session, or six years after the cause of action; and all actions for penalties, damages, or sums given to the party grieved, within a year after the session, or two years after the cause of action, and not after.

S. 4. Infants, *femes covert*, persons *non compos mentis*, or beyond the seas, to have the above periods after the disability is over, and the same in case of the absence beyond seas of defendants at the time the cause of action accrues.

S. 5. Proviso, similar to that in 9 G. 4, c. 14, in case of acknowledgment in writing or part payment. Plaintiff may, in answer to a plea of this statute, reply such acknowledgment, and that the action was brought within the time aforesaid.

S. 6. If in any of said actions judgment for plaintiff be reversed on error, or arrested, or defendant be outlawed and reverse the outlawry, the plaintiff, his executors or administrators, may commence a new action within a year, and not after.

S. 7. No part of the United Kingdom, nor the Isles of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to them, to be deemed beyond the seas within the meaning of this Act, or of 24 Jac. 1, c. 7.

S. 8. No plea in abatement for non-joinder of a co-defendant shall be allowed unless it state that he is resident within the jurisdiction of the court, and his residence be stated with convenient certainty in an affidavit verifying the plea.

S. 9. To a plea in abatement of non-joinder of any person, the plaintiff may reply such person's bankruptcy and certificate, or discharge under the Insolvent Act.

S. 10. When, after plea in abatement, plaintiff shall discontinue and commence a fresh action against the former defendants and the persons whose non-joinder was pleaded, and it shall appear by the pleadings or evidence that all the original defendants are liable, but that any of the new defendants are not, the plaintiff shall nevertheless be entitled to verdict and judgment against the defendants liable, and the defendants not liable shall have judgment and costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendants who pleaded in abatement: Provided that the latter shall be at liberty to give evidence of the liability of the parties named in the plea.

S. 11. Misnomer not to be pleaded in abatement, but the defendant to be at liberty to cause the declaration to be amended by summons, on affidavit, at the costs of the plaintiff; if the summons be discharged, the costs to be paid by the defendant, if the judge think fit.

S. 12. In actions on written instruments in which any of the parties are designated by initial letters, or contractions of the christian name, the same shall be sufficient in the affidavit to hold to bail, process, and declaration.

S. 13. Wager of law abolished.

S. 14. Debt on simple contract to be maintainable against executors and administrators.

S. 15. Any eight or more of the judges, at any time within five years after this Act takes effect, may make regulations (as in s. 1.) touching the voluntary admission, on application at a reasonable time before the trial, by one party to the other of all written or printed documents or copies to be offered in evidence by the party requiring the admission, and the previous inspection thereof, and the costs of proof in case of the omitting to apply for the admission, or of the not producing the documents for obtaining the admission, or of a refusal to admit; the rules and orders so made to be of the same force as if expressly enacted by Parliament.

S. 16. Writs of inquiry under the 8 and 9 Will. 3, c. 11, shall, unless

the court or a judge order otherwise, be executed before the sheriff instead of the judges of assize or nisi prius.

S. 17. In any action in the superior courts in which the debt or demand indorsed on the writ of summons shall not exceed 20*l.*, the court or a judge, if satisfied that a trial will not involve any difficult question of fact or law, may order the issue to be tried before the sheriff of the county in which the action is brought, or any judge of any court of record for the recovery of debt in the county, and a writ shall issue to the sheriff accordingly, and thereupon the sheriff or judge shall summon a jury and try the issue or issues.

S. 18. On the return of any writ under the two last sections, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy, or judge, certify in favour of an application for a new trial, or a judge of the superior courts order judgment or execution to be stayed; and the verdict in such cases shall be of the like force as a verdict at nisi prius; and the sheriff, &c. to have the like powers as to amendment on the trial as are hereinafter given to judges at nisi prius.

S. 19. The provisions of 1 W. 4, c. 7, to extend to such writs of inquiry and issues.

S. 20. After the first day of June, 1833, every sheriff to name a deputy, who shall have an office within a mile of the Inner Temple Hall, for the receipt of writs, granting warrants, making returns, accepting rules, &c. &c.

S. 21. The defendant, in all personal actions, (except assault and Battery, false imprisonment, slander, malicious arrest or prosecution, crim. con., or seduction,) by leave of the court or a judge, may pay into court money for amends, in such manner and under such regulations as to costs and pleading as the judges shall direct.

S. 22. In local actions, the court or a judge may, on either party's application, order the issue to be tried or writ of inquiry executed, in any other county or place than that where the venue is laid, and order a suggestion to be entered on the record accordingly.

S. 23. Courts and judges at nisi prius empowered to cause the record, writ, or document, on which a trial is pending in any civil action, or any information in the nature of a quo warranto, or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth on the record, &c., on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particulars not material to the merits of the case and by which the opposite party cannot have been prejudiced, to be forthwith amended, both in the part of the pleadings where the variance occurs, and in every other part of them which it may become necessary to amend, on such terms as to costs or postponement of trial, or both, as they may think reasonable; and if the variance is in particulars in their judgment not material to the merits, but whereby the opposite party may have been

prejudiced, then the amendment to be made on payment of costs, and withdrawal of the record or postponement of the trial, as the court or judge shall think reasonable : and after such amendment, the trial, if it be proceeded with, shall proceed in all respects as if no such variance had appeared : the order for amendment to be indorsed on the postea, writ of inquiry, &c. or roll, and returned with the record or writ, and thereupon the other parts of the record, &c. to be amended accordingly ; provided that either party dissatisfied with the decision as to such amendment, may apply for a new trial on that ground ; to be granted on such terms as the court think fit.

S. 24. In all such cases of variance, the court and judge may, instead of causing the amendment to be made, direct the facts to be found specially, and stated on the record, &c., and thereupon the court, if they think the variance immaterial, and of no prejudice, may give judgment according to the right and justice of the case.

S. 25. Parties in any action or information, after issue joined, by consent and a judge's order, may state the facts in a special case, and agree that judgment be entered for plaintiff or defendant by confession or *nol. pros.* on the decision of the case.

S. 26. Witnesses objected to as incompetent, on the ground of the verdict or judgment being evidence for or against them, shall be examined, but the verdict or judgment shall not be evidence for or against them.

S. 27. The names of such witnesses, with the names of the party on whose behalf they were examined, to be indorsed on the record at the request of either party, and entered on the record of the judgment ; and such indorsement and entry to be evidence in subsequent proceedings that such witnesses were examined.

S. 28. On debts or sums certain, payable at a certain time or otherwise, the jury may allow interest at the current rate from the time when such debts, &c. were payable by written instrument at a certain time, or from demand of payment made in writing, giving notice that interest will be so claimed : proviso that interest shall be payable in all cases in which it is now payable by law.

S. 29. The jury may also give damages in the nature of interest, over and above the value of the goods at the time of conversion or seizure, in trover or trespass *de bonis asportatis*, and over and above the money recoverable on policies of assurance hereafter made.

S. 30. If in any writ of error on a judgment in a personal action, the court shall give judgment for the defendant in error, interest shall be allowed for the time execution has been delayed by the writ of error.

S. 31. Executors and administrators suing in right of the testator or intestate, to be liable to costs in case of nonsuit or verdict for defendant, as if suing in their own right, unless the court or a judge shall otherwise order.

S. 32. One or more of several defendants having a *nolle prosequi* or a verdict, shall have costs, unless the judge certify on the record that there was reasonable cause for making them defendants.

S. 33. Where a *nolle prosequi* is entered as to part of a declaration, defendant to have costs in that behalf.

S. 34. Plaintiff in *sci. fa.* obtaining judgment, to have costs on a judgment by default as well as on issue joined; and plaintiff or defendant on demurrer obtaining judgment to have costs.

S. 35. Provisions of 6 Geo. 4, c. 50, as to costs of a special jury; to apply to cases of nonsuit as well as of verdict for defendant.

S. 36. Gives power to the judges to make regulations for taxation of costs by any of the officers of the superior courts indiscriminately, in respect of business done in any of the courts.

S. 37, 38. Executors or administrators of any lessor may distrain for arrears of rent due in his life time: and such arrears may be distrained for after the determination of the term or lease at will, in the same manner as if it were subsisting; but within six calendar months after the determination, and during the possession of the tenant in arrear. Provisions of former acts relating to distresses to apply to these.

S. 39. Submission to arbitration by rule of court, judge's order, or order of *nisi prius*, in actions now brought, or hereafter to be brought, not to be revocable without leave of the court or of a judge; and the court or a judge may from time to time enlarge the term for making the award.

S. 40. Power to the court or a judge in such cases to compel the attendance of witnesses on certain terms.

S. 41. Power to arbitrators under a rule of reference, &c. to administer an oath, and persons swearing falsely liable to penalties of perjury.

S. 42. Power of superior courts of common law and equity to grant commissions to take affidavits, extended to Scotland and Ireland, and the Isle of Man.

S. 43. All Holidays mentioned in 5 & 6 Edw. 6, c. 3, abolished, except Sundays, Christmas Day and three following days, and Easter Monday and Tuesday.

S. 44. Act to commence 1st June, 1833.

S. 45. Not to extend to Scotland or Ireland, except as before mentioned.

CAP. 43.—An Act for transferring to the Commissioners of His Majesty's Woods and Forests the several Powers now vested in the Holyhead Road Commissioners, and for discharging the last-mentioned Commissioners from the future Repairs and Maintenance of the Roads, Harbours, and Bridges now under their Care and Management.

[14th August, 1833.]

CAP. 44.—An Act to repeal so much of Two Acts of the Seventh and Eighth Years and the Ninth Year of King George the Fourth, as inflicts the Punishment of Death upon Persons breaking, entering, and stealing in a Dwelling House: also for giving Power to the Judges to add to the Punishment of Transportation for Life in certain Cases of Forgery, and in certain other Cases.

[14th August, 1833.]

S. 1. So much of 7 & 8 Geo. 4, c. 2, and 9 Geo. 4, c. 55, as inflicts the punishment of death for the felonies herein described, repealed from 1st January 1834.

S. 2. After 1st January 1834, persons convicted as principals or accessories before, of breaking and entering any dwelling house, and stealing therein any chattel, money, or valuable security, shall be liable to be transported for life or not less than seven years, and to be previously imprisoned with or without hard labour, for any term not exceeding four years or less than one year, or to be confined in the Penitentiary not exceeding four years.

S. 3. Persons punishable with transportation for life under 2 & 3 W. 4, c. 62 and 123, liable to be previously imprisoned as before-mentioned.

CAP. 45.—An Act to declare valid Marriages solemnized at Hamburgh since the Abolition of the British Factory there. [14th August, 1833.]

CAP. 46.—An Act to enable Burghs in Scotland to establish a general System of Police. [14th August, 1833.]

CAP. 47.—An Act to authorize His Majesty to give further Powers to the Judges of the Court of Bankruptcy, and to direct the Times of Sitting of the Judges and Commissioners of the said Court.

[28th August, 1833.]

S. 1. Reciting 7 Geo. 4, c. 57, and 1 & 2 W. 4, c. 56; empowers the king, by commission under the Great Seal, to authorize the puisne judges in bankruptcy to act as Commissioners in the Insolvent Debtors' Court, at such times and for such purposes as therein specified.

S. 2. Such judges to have the same powers as the Commissioners of the Insolvent Court.

S. 3. Empowers the Insolvent Court to order prisoners in any gaol in Wales to be brought before one of the commissioners or judges in bankruptcy, on circuit, to be heard on his petition as in England; but the court may still order them before the justices of the peace in cases where they see fit.

S. 4. The clerks of the peace in Wales to bring the petitions, schedule, &c. &c. to the place of hearing, as in England, and to be entitled to the same allowance as under 7 Geo. 4, c. 57.

S. 5. Treasury may direct payment of judges' and officers' travelling expenses.

S. 6. Court of Review may direct their registrars and deputy registrars to attend the judges acting under this act.

S. 7. Empowers the king, by warrant under the sign manual, to authorize one or more judges of the Court of Bankruptcy to exercise the same jurisdiction as by 1 & 2 W. 4 are given to any three of the judges, and also to direct at what times the Court of Review, and the judges and commissioners in bankruptcy, shall hold their sittings.

S. 8. Costs in bankruptcy shall be taxed by one of the registrars or deputy registrars of the Court of Bankruptcy.

CAP. 48.—An Act to amend an Act of the Second and Third Years of His present Majesty, relating to Stage Carriages in Great Britain; and also to explain and amend an Act of the First and Second years of His present Majesty, relating to Hackney Carriages used in the Metropolis.

[28th August, 1833.]



CAP. 49.—An Act to allow Quakers and Moravians to make Affirmation in all Cases where an Oath is or shall be required. [28th August, 1833.]

S. 1. Quakers and Moravians permitted to make a solemn affirmation instead of an oath, in all places and for all purposes where an oath is or shall be required by common law or statute; such affirmation to have the effect of an oath; and persons convicted of affirming falsely to incur the penalties of perjury.

S. 2. Gives a form of affirmation in lieu of the oath of abjuration.

CAP. 50.—An Act to repeal the several Laws relating to the Customs. [28th August, 1833.]

CAP. 51.—An Act for the Management of the Customs. [28th August, 1833.]

CAP. 52.—An Act for the general Regulation of the Customs. [28th August, 1833.]

CAP. 53.—An Act for the Prevention of Smuggling. [28th August, 1833.]

CAP. 54.—An Act for the Encouragement of British Shipping and Navigation. [28th August, 1833.]

CAP. 55.—An Act for the Registering of British Vessels. [28th August, 1833.]

CAP. 56.—An Act for granting Duties of Customs. [28th August, 1833.]

CAP. 57.—An Act for the Warehousing of Goods. [28th August, 1833.]

CAP. 58.—An Act to grant certain Bounties and Allowances of Customs. [28th August, 1833.]

CAP. 59.—An Act to regulate the Trade of the British Possessions abroad. [28th August, 1833.]

CAP. 60.—An Act for regulating the Trade of the Isle of Man. [28th August, 1833.]

CAP. 61.—An Act to admit Sugar without Payment of Duty to be refined for Exportation. [28th August, 1833.]

CAP. 62.—An Act to defray the Charge of the Pay, Clothing, and contingent and other Expenses of the disembodied Militia in Great Britain and Ireland; and to grant Allowances in certain Cases to Subaltern Officers, Adjutants, Paymasters, Quartermasters, Surgeons, Assistant-Surgeons, Surgeons' Mates, and Serjeant Majors of the Militia, until the first day of July one thousand eight hundred and thirty-four. [28th August, 1833.]

CAP. 63.—An Act to render valid Indentures of Apprenticeship allowed only by Two Justices acting for the County in which the Parish from which such Apprentices shall be bound, and for the county in which the parish into which such apprentices shall be bound, shall be situated; and also for remedying defective Executions of Indentures by Corporations. [28th August, 1833.]

S. 1. Indentures for the binding of parish apprentices heretofore allowed, and which hereafter shall be allowed, by two justices acting as well for the county or district out of which the child shall be bound, as for that into which he shall be bound, shall be as valid to all intents and purposes as if allowed by two justices of each district.

S. 2. Indentures for binding out poor children, heretofore or hereafter executed by officers of incorporated districts, by affixing the seal of the corporation, to be deemed well executed.

S. 3. Indentures for binding parish apprentices within corporate places, to be allowed by two justices, one for the county and the other for the corporate place.

S. 4. Act not to affect decisions already come to.

CAP. 64.—An Act to amend an Act of the Second and Third Years of His present Majesty, for regulating the Care and Treatment of Insane Persons in England. [28th August, 1833.]

S. 1. The appointments of meetings of visitors under 2 & 3 W. 4, c. 107, to be as private as possible, so that proprietors and superintendents of the houses to be visited shall not have notice of the time.

S. 2. The clerk of the metropolitan commissioners and clerks of the peace to preserve all orders, certificates, and notices transmitted to them, and enter in a register the names of the insane persons to whom they refer, within five days. Penalty on neglect £5.

S. 3, 4, 5. Notice of deaths or removals of patients to be transmitted to the clerk of the metropolitan commissioners: and all copies of orders and certificates and notices, which have been transmitted to him or to the clerks of the peace, to be registered: and notices of deaths, removals, &c. since 11th August 1832, if not already transmitted, to be forthwith transmitted to clerk of metropolitan commissioners or clerks of the peace.

S. 6. Commissioners being practising barristers to receive allowance according to the scale of payment to medical commissioners under 2 & 3 W. 4; but not more than two commissioners to be capable of receiving allowance at the same time; and if more than two be practising barristers, the allowance to be made to two of such barristers.

S. 7. Proprietors and superintendents wilfully neglecting to comply with this act, guilty of a misdemeanor: prosecutions to be carried on and penalties recovered as under recited act.

S. 8. Interpretation clause of recited act to extend to this act.

CAP. 65.—An Act to enable the Commissioners for executing the Office of Lord High Admiral of the United Kingdom to acquire certain Lands at Woolwich, in the County of Kent, for better securing His Majesty's Docks there, and for the Improvement of the same.

[28th August, 1833.]

CAP. 66.—An Act to authorize the Commissioners of His Majesty's Treasury to purchase the Duties of Package, Scavage, Balliage, and Portage belonging to the Corporation of London. [28th August, 1833.]

CAP. 67.—An Act to amend an Act of the Second Year of His present Majesty, for the Uniformity of Process in Personal Actions in His Majesty's Courts of Law at Westminster. [28th August, 1833.]

S. 1. All writs of summons, *distringas*, &c. issued into Middlesex from K. B., to be signed, sealed, and issued, and the fees taken and accounted for, by the same persons and in like manner as other writs of K. B. under 2 W. 4, c. 39, s. 1.

S. 2. Writs of *venire facias* (except on trials at bar) may be tested on the day when issued, and made returnable forthwith; and writ of *distingas juratores* or *habeas corpora juratorum* may be tested in term or vacation on a day subsequent to the teste of the *venire facias*, and writs of execution may be tested on the day when issued, and be made returnable immediately after execution.

CAP. 68.—An Act to amend the Laws relating to the Sale of Wine, Spirits, Beer, and Cider, by retail, in Ireland. [28th August, 1833.]

CAP. 69.—An Act to extend and enlarge the Powers of the Commissioners of His Majesty's Woods, Forests, Land Revenues, Works, and Buildings, in relation to the Management and Disposition of the Land Revenue of the Crown in Ireland. [28th August, 1833.]

CAP. 70.—An Act to alter and amend an Act of the Forty-first Year of His Majesty King George the Third, for the better Regulation of Public Notaries in England. [28th August, 1833.]

S. 1. The 41 Geo. 3, c. 79, regulating the apprenticeship and admission of public notaries, shall be limited to a circuit of ten miles from the Royal Exchange, London, so far as it affects attorneys, solicitors, or proctors, admitted as hereinafter mentioned.

S. 2. Attornies, solicitors, and proctors, duly admitted, sworn, and inrolled, &c. residing out of those limits, may be admitted notaries public.

S. 3. This act not to authorize them to practise within the above limits.

S. 4. Notaries practising within those limits, or out of their respective districts, to be struck off the roll of faculties.

CAP. 71.—An Act for the Appointment of convenient Places for the holding of Assizes in England and Wales. [28th August, 1833.]

S. 1. The statutes 6 Rich. 2, c. 5, and 11 Rich. 2, c. 11, relating to the holding of assizes, repealed.

S. 2. The King in Council may direct at what places in any county, assizes and sessions of gaol delivery shall be holden, and that they may be respectively holden at more than one place in a county on the same circuit; and the same of special commissions.

S. 3. Power for that purpose to divide counties, and to make regulations concerning the venue, attendance of jurors, use of gaols, alteration of writs, &c. &c.; such regulations to be of the same force as if made by authority of parliament, and to be published in the Gazette.

S. 4. Power to direct the Court of Common Pleas at Lancaster to be holden at any one or more places in the county, and to divide the county in like manner.

CAP. 72.—An Act for carrying into effect Two Conventions with the King of the French, for suppressing the Slave Trade.

[28th August, 1833.]

CAP. 73.—An Act for the Abolition of Slavery throughout the British Colonies; for promoting the Industry of the manumitted Slaves; and for compensating the Persons hitherto entitled to the Services of such Slaves. [28th August, 1833.]

**CAP. 74.—An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.**

[28th August, 1833.]

**S. 1.** Interpretation clause.

**S. 2.** No fine or recovery to be levied or suffered after 31st December 1833.

**S. 3.** Persons liable after 31st December 1833, to levy fines or suffer recoveries under any covenant or agreement entered into before 1st January 1834, if all or any of the purposes intended to be effected thereby can be effected by a disposition under this act, shall be liable to make such a disposition under this act as will effect the purposes intended: but in any case where the purposes intended cannot be so effected, the persons so liable shall execute a deed declaring their desire that it shall have the same operation as the fine or recovery would have had; and it shall have such operation as to all the purposes which cannot be effected under this act.

**S. 4.** Fines and recoveries of lands in ancient demesne, already or hereafter to be levied or suffered in a superior court, may be reversed as to the lord by writs of deceit, the proceedings in which are already pending; or by writs of deceit hereafter to be brought; but shall be as valid against the conusors and vouches, and all parties claiming under them, as if not reversed as to the lord.

**S. 5.** Fines and recoveries of lands in ancient demesne, already or hereafter levied or suffered in the manor court, after other unreversed fines and recoveries in a superior court, shall be as valid as if the tenure had not been changed: and in all other cases where fines or recoveries shall have been levied or suffered in courts whose jurisdiction does not extend to the lands comprised therein, or was unduly assumed, they shall not be invalid on that account.

**S. 6.** Tenure of ancient demesne, where suspended or destroyed by fine or recovery in a superior court, restored in cases in which the lord's rights shall have been recognized within twenty years before 1st January 1834, and the lord shall not reverse the fine or recovery before that day.

**S. 7, 8.** Fines and recoveries made valid without amendment as to errors in the names of the parties; or misdescription or omission of lands; in any part of the proceedings.

**S. 9.** Jurisdiction of courts to amend, in cases not herein provided for, saved. ●

**S. 10.** Recoveries not to be invalid by reason of neglect to enrol the bargain and sale in due time, provided they would have been valid but for that omission.

**S. 11.** Recoveries not to be invalid by reason of persons in whom an estate at law was outstanding having omitted to make a tenant to the writ of entry; where the person who was the owner of, or had power to dispose of, an estate for life or more in possession in the lands, shall, within the time limited for making the tenant to the writ, have conveyed his estate to such tenant: an estate to be deemed in possession, notwith-

standing a prior lease for lives or years, or term of years. [N. B. The foregoing sections are all retrospective.]

S. 12. Fines and recoveries not to be made valid by this act, in the following cases:—where they have been wholly reversed; or where partially reversed, as far as they have been reversed; or where any persons have had dealings with the lands on the faith of the fines or recoveries being invalid; or as to lands of which any person is in possession in respect of any estate which the fine or recovery, if valid, would have barred; or where any court of competent jurisdiction has refused an amendment: nor shall the act affect proceedings pending at the time of its passing, in which the validity of the fine or recovery is questioned, or give validity to it if invalidated by such proceedings; and if such proceedings abate by the death of the party disputing the fine or recovery, the party then entitled shall have six calendar months to commence fresh proceedings.

S. 13. Provides for the depositing, inspection, &c. of records of fines and recoveries in the Common Pleas at Westminster and Lancaster, and the Court of Pleas at Durham, after 31st December 1833, as heretofore; and that they shall be evidence as heretofore.

S. 14. Estates tail, and estates expectant thereon, not to be barrable by warranty after 31st December 1833.

S. 15. After that day, every actual tenant in tail in possession, remainder, or contingency, shall have power to dispose of the entailed lands in fee simple or for any less estate, as against all persons claiming by force of the estate tail, and all persons, the crown included, whose estates are to take effect on the determination or in defeasance of the estate tail.

S. 16. Power of disposition not to be exercised by women tenants in tail *ex provisione viri*, except with the assent required by 11 H. 7, c. 20.

S. 17. Except as to settlements made before this act, the statute 11 H. 7, c. 20 repealed.

S. 18. The power of disposition not to extend to tenants in tail who are restrained from barring their estates by 34 & 35 H. 8, or any other act; or to tenants in tail after possibility of issue extinct.

S. 19. After 31st December 1833, where an estate tail has been or shall be converted into a base fee, the person who would otherwise have been actual tenant in tail shall have power to dispose of the lands as against all reversioners (the crown included) so as to enlarge the base fee into a fee simple.

S. 20. The act not to enable persons to dispose of lands in respect of expectancies they may have as issue inheritable to an estate tail.

S. 21. Dispositions made by tenant in tail under this act, by way of mortgage, or for any other limited purpose, to be a bar in equity and at law, notwithstanding a contrary intention, expressed or implied: but if the estate so created be only *pur autre vie*, or for years absolute or determinable, or if a charge be created without a term or greater estate for securing it, the disposition shall in equity be a bar only so far as

to give effect to the mortgage, &c. notwithstanding a contrary intention expressed or implied.

S. 22. The owner of the first existing estate (not being for years only) under a settlement prior to an estate tail under the same settlement, shall be the Protector of the settlement: and to be deemed the owner, notwithstanding incumbrances, and notwithstanding an absolute disposition by him, or by his bankruptcy or insolvency, of such prior estate; and an estate by the curtesy in respect of the estate tail or prior estate, or an estate by way of resulting use or trust for the settlor, to be deemed a prior estate within this clause.

S. 23. Each of two or more owners of a prior estate to be the sole protector as to his share.

S. 24. Where a married woman would, if single, be the protector of a settlement in respect of a prior estate not settled to her separate use, she and her husband together shall be the protector, and be deemed one owner; where the estate is so settled, she alone shall be the protector.

S. 25. In the case of a settlement merely by way of confirmation of, or merely restoring, an estate, such estate shall, for the purposes of this act as to the protector, be deemed an estate subsisting under the settlement.

S. 26. But the person in whose favour a lease at a rent is created or confirmed by a settlement, shall not be the protector in respect thereof.

S. 27. No tenant in dower, bare trustee, (except in the case provided for by s. 31,) heir, executor, &c. to be protector.

S. 28. Where there are more than one estate prior to the estate tail, and the owner of one of them is excluded from being protector by the two last clauses, the party who would be the protector if *his* estate did not exist, shall be the protector.

S. 29. Where an estate under a settlement shall have been disposed of by 31st December 1833, the person who would be the proper person to make the tenant to the writ of entry in a recovery, shall be the protector during the continuance of the estate which conferred the right to make such tenant.

S. 30. Where a person having on or before 31st December 1833 made any disposition out of a remainder or reversion, would but for this clause have been the protector, and so enabled to concur in the barring of the remainder or reversion, the person who would have been the proper person to make the tenant to the writ of entry in a recovery, shall be the protector during the continuance of the estate which conferred the right to make such tenant.

S. 31. A bare trustee under a settlement heretofore made, who would have been the proper person to make the tenant to the writ in a recovery, shall be the protector during the continuance of his estate.

S. 32. Power to any settlor to appoint not more than three persons to be protector in lieu of the person who would otherwise be so; and to give power to perpetuate the protectorship in not more than three persons, to be appointed by deed by the donee of the power, such latter

persons to be protector jointly with any other then existing protector; such deeds to be void unless enrolled in Chancery within six months: provided that the person who would be protector but for this clause, may be one of the persons appointed under this clause; and shall, unless the settlor otherwise direct, act as sole protector on the death or renunciation of the others, until a fresh appointment.

S. 33. In cases of lunacy, the Lord Chancellor, Lord Keeper, &c. or other persons entrusted with the care of lunatics, shall be protector; and in cases of treason or felony, or if a person, not being the owner of a prior estate, shall be protector, and shall be an infant, or it be uncertain whether he is living or dead, the Court of Chancery shall be protector; and if the settlor shall exclude the owner of the prior estate from being protector, and not appoint another, the Court of Chancery shall be protector in his stead; and so also in every case where there is no protector during the continuance of a prior estate sufficient to qualify the owner of it to be the protector.

S. 34. Where there is a protector, his consent shall be requisite to enable an actual tenant in tail to create a larger estate than a base fee.

S. 35. Where there is a base fee, the protector's consent shall be requisite to the exercising the power of enlarging it given by s. 19.

S. 36. The protector to be subject to no controul in the exercise of his consenting power; nor to be deemed a trustee, or subject to the interference of a court of equity.

S. 37. The rules of equity as to transactions between the donee and the object of a power, not to apply as between the protector and a tenant in tail under the same settlement.

S. 38. A voidable estate by a tenant in tail in favour of a purchaser for valuable consideration, shall be confirmed by a subsequent disposition by such tenant in tail under this act, made with consent of the protector; but not against a purchaser without notice.

S. 39. Base fees, when united with the immediate reversions, to be enlarged instead of being merged.

S. 40. Every disposition of lands made by tenant in tail, under this act, to be made by deed, as if he were seised in fee, but not by will or contract; and if by a married woman, her husband's concurrence necessary, and the deed to be acknowledged by her as directed in s. 79.

S. 41. Every assurance by tenant in tail, except a lease not exceeding twenty-one years at a rack rent or not less than 5-6ths thereof, to be inoperative, unless enrolled in Chancery within six calendar months after execution; and such period to be sufficient, notwithstanding 28 Hen. 8, c. 16.

S. 42. Protector's consent to be given by the same assurance, or by a distinct deed of not later date, or to be void.

S. 43. If given by distinct deed, to be considered unqualified, unless he refer to the assurance, and confine his consent to the disposition thereby made.

S. 44. A married woman protector to consent as a feme sole.



S. 45. Consent of protector by distinct deed to be inrolled with or before the assurance, otherwise void.

S. 46. Courts of Equity altogether excluded from giving any effect to dispositions by tenants in tail, or consents of protectors, under this act, which would not be effectual in courts of law; and no disposition or consent to be effectual in equity, unless it would be so at law.

S. 48, 49. Lord Chancellor, &c. when protector of a settlement, or joint protector with another, to have power to consent, on motion or petition, to a disposition by the tenant in tail, and to make such orders as may be thought necessary; the order to be evidence of consent.

S. 50. The previous clauses to apply to copyholds, except that a disposition by tenant in tail, having an estate at law, shall be by surrender, and where he has an estate in equity, either by surrender or by a deed as hereinafter provided.

S. 51. Protector's consent to a disposition by tenant in tail of copyholds to be executed at or before the surrender, and produced to the lord or steward, or else to be void; and the lord or steward, on its production, to indorse on it an acknowledgment thereof, and enter it on the court rolls; and the indorsement to be *prima facie* evidence of its production, and of its own genuineness; and the lord or steward afterwards to indorse a memorandum of the entry of the deed on the court rolls.

S. 52. Protector's consent to disposition of copyholds, if not given by deed, shall be given to the surrenderee; and if the surrender be taken out of court, the memorandum of surrender shall state the consent, and shall be signed by the protector, and entered on the court rolls, and shall be evidence of the consent and surrender: if the surrender be made in court, an entry thereof shall be made on the court rolls, stating the consent, and shall be evidence like any other entry on the court rolls.

S. 53. Power to equitable tenants in tail of copyholds to dispose of their lands by deed as if they were freehold, and the previous clauses of the act to apply to such disposition, as far as circumstances will admit: the deed to be entered on the court rolls, and the protector's consent to be void, when given by a distinct deed, unless it be of as early execution; such deed of consent to be also entered on the court rolls:—but every such disposition of copyholds to be void against purchasers for valuable consideration under a subsequent assurance duly entered on the court rolls, unless first entered thereon.

S. 54. Inrolment not necessary as to copyholds.

S. 55. The Bankrupt Act, 6 Geo. 4, c. 16, s. 65, as to estates tail, repealed; but the repeal not to apply to commissions or fiats issued before 1st Jan. 1833, nor to revive former acts.

S. 56. The commissioner, in the case of an actual tenant in tail becoming bankrupt after 31st Dec. 1833, may dispose by deed of the bankrupt's lands to a purchaser; but if the protector withhold his consent, the deed to convey only as large an estate as the tenant in tail could himself have conveyed without such consent.

S. 57. And in the case of the bankruptcy of a tenant in tail entitled to

a base fee, the commissioner may by disposition to a purchaser, provided there be no protector, enlarge the base fee as the bankrupt might have done under this act.

S. 58. In case of bankruptcy, the commissioners to stand in place of the tenant in tail as to the protector's consent, and the disposition with such consent to be equally valid notwithstanding a prior disposition by the commissioners without consent, or a prior sale or conveyance under the bankrupt acts; and all the previous clauses as to consent, inrolment, &c., in the case of freeholds, to apply to consents given under this clause.

S. 59. Disposition by commissioner of bankruptcy of freeholds to be void unless inrolled within six months; and similar provisions as before respecting the disposition of copyholds, entry on court rolls, consent, &c. in the case of bankruptcy.

S. 60, 61. Where, for want of the protector's consent, dispositions by commissioner of bankruptcy created only a base fee, immediately on there ceasing to be a protector, such base fee shall enlarge into the same estate as if there had been no protector at the time of the disposition: so also where the tenant in tail is entitled to a base fee at his bankruptcy, and the lands are sold or conveyed under the bankrupt acts.

S. 62. A voidable estate created in favour of a purchaser for valuable consideration, by an actual tenant in tail, or a tenant in tail entitled to a base fee, who shall become bankrupt, shall be confirmed by the disposition of the commissioner where there is no protector, or with his consent where there is, or without it when there ceases to be a protector: but not against a purchaser without notice.

S. 63, 64. Acts of a bankrupt tenant in tail void against any disposition under this act by the commissioner: but subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt tenant in tail shall retain the same powers of disposition under this act as if he had not become bankrupt.

S. 65. The disposition by the commissioner of the lands of a bankrupt tenant in tail shall, if the bankrupt be dead, have the same operation as if he were alive, in the following cases: where at his death there shall be no protector of the settlement; or if at the time of the disposition, there shall be any issue inheritable to the bankrupt's estate tail, and either no protector of the settlement, or a protector who shall duly consent to the disposition, or shall not consent: or if, where the bankrupt had a base fee, there shall be issue who would, if the base fee had not been created, have been actual tenant in tail, and either no protector, or a protector who shall consent to the disposition.

S. 66. Every disposition by a commissioner of bankruptcy of copyhold lands, where the estate shall not be merely equitable, to have the same operation as a surrender, and the person to whom the land is so disposed of may claim to be admitted on payment of fines, &c.

S. 67. Assignees to recover in the mean time rents of the lands of a bankrupt of which the commissioner has power to make disposition under this act, and to enforce covenants and agreements, as if entitled to the

reversion, and to have the remedies, &c. given by 11 Geo. 2, c. 19; this clause to apply to all copyhold lands; but only to such lands of other tenure as the commissioner has power under this act to dispose of after the bankrupt's death.

S. 68. All the provisions of the act in regard to bankrupts to apply to lands in Ireland: with saving of the rights of the crown to reversions and remainders therein.

S. 69. Deeds relating to the lands of bankrupts in Ireland to be enrolled in chancery there.

S. 70. Stat. 7 Geo. 4, c. 45, repealed except as to proceedings commenced before 1st Jan. 1834.

S. 71. The previous clauses to apply to lands of any tenure to be sold, where the purchase money is to be invested in the purchase of lands to be entailed, and also where money is liable to be invested in like manner,—with these variations: that where a disposition is to be made of leasehold lands or money so circumstanced, it shall, as to the person taking under the disposition, be treated as personal estate, and such disposition shall, except in case of bankruptcy, be an assignment by deed, to be inrolled in chancery within six months; and in case of bankruptcy the disposition shall be made by the commissioner, and completed by inrolment as before required for freehold lands.

S. 72. Lands of any tenure in Ireland to be sold, where the purchase money is to be invested in the purchase of lands to be entailed; and money under the control of a court of equity in Ireland, subject to be invested in like manner, to be subject to this act in case of bankruptcy.

S. 73. The practice as to acknowledging deeds before inrolment not to apply to inrolments under this act.

S. 74. Deeds required to be inrolled, by which lands or money shall be disposed of under this act, to take effect as if inrolment were not required, but to be void against subsequent purchasers for valuable consideration whose deeds shall be first inrolled.

S. 75, 76. The Court of Chancery to regulate the fees to be paid for the inrolment of deeds, &c., and the Court of Common Pleas those for entries on court rolls and indorsements of deeds, and for taking consents, &c.

S. 77. After 31st Dec. 1833, a married woman, with her husband's concurrence, may dispose by deed of lands of any tenure, and of money subject to be invested in the purchase of lands, and of any estate therein, and may release or extinguish powers as fully as if she were a feme sole; the deed to be acknowledged by her as directed by s. 79: but this clause not to extend to copyholds to which she or her husband in her right may be entitled at law, in any case where the objects of this clause could have been effected by her, with her husband's concurrence, by surrender.

S. 78. The powers of disposition hereby given to a married woman not to interfere with any other powers vested in her, except so far as by such disposition they may be suspended or extinguished.

S. 79. Every deed by a married woman under this act, not executed by her as protector, to be acknowledged by her before a judge, master in

chancery, or two perpetual or special commissioners hereinafter appointed.

S. 80. The judge, &c., before receiving such acknowledgment, to examine her apart from her husband, and unless she freely consents the deed to be void as to her execution.

S. 81. The Chief Justice of the Common Pleas to appoint persons for every county, &c. to be perpetual commissioners for taking such acknowledgments, to be removable at pleasure; and lists of their names and districts to be made out and kept by an officer of the court, who shall transmit them from time to time to the clerk of the peace.

S. 82. Power of the perpetual commissioners not confined to their particular districts.

S. 83. If from residence beyond seas, ill health, &c. a married woman be prevented from making the acknowledgment before a judge, master, or perpetual commissioner, special commissioners to be appointed to take her acknowledgment.

S. 84. When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum on the deed, and a certificate of taking the acknowledgment on a separate parchment (forms are subjoined.)

S. 85. Such certificate, with an affidavit verifying it, to be lodged with an officer of the court of Common Pleas, who shall cause the same to be filed of record.

S. 86. On filing the certificate, the deed to take effect by relation from the time of acknowledgment.

S. 87, 88. The officer with whom the certificates are lodged to make an index of them, and to deliver a signed copy to any person applying, which shall be evidence.

S. 89. The Chief Justice of the Common Pleas to appoint the officer with whom the certificates shall be lodged; and the court to make orders touching the examination, memorandums, certificates, affidavits, &c.

S. 90. A married woman to be separately examined on the surrender of an equitable estate in copyholds as if the estate were legal.

S. 91. Court of Common Pleas, where the husband is a lunatic or from any other cause incapable of executing a deed or making a surrender, or his residence is not known, or he is in prison, or living apart from his wife, may dispense with his concurrence, except where the Lord Chancellor (or other persons intrusted with care of lunatics) or the Court of Chancery, shall be the protector of the settlement in lieu of the husband,

S. 92. This act not to extend to Ireland except when expressly mentioned.

S. 93. Act may be altered this session.

CAP. 75.—An Act to continue until the end of the next Session of Parliament two Acts for the Prevention, as far as may be possible, of the Disease called the Cholera, or Spasmodic or Indian Cholera, in England and Scotland.

[28th August, 1833.]

CAP. 76.—An Act to alter and amend the Laws for the Election of the Magistrates and Councils of the Royal Burghs in Scotland.

[28th August, 1833.]

**CAP. 77.**—An Act to provide for the Appointment and Election of Magistrates and Councillors for the several Burghs and Towns in Scotland, which now return or contribute to return Members to Parliament, and are not Royal Burghs. [28th August, 1833.]

**CAP. 78.**—An Act to amend the Laws relating to Grand Juries in Ireland. [28th August, 1833.]

**CAP. 79.**—An Act to provide for the more impartial Trial of Offences in certain Cases in Ireland. [28th August, 1833.]

**CAP. 80.**—An Act requiring the Annual Statements of Trustees or Commissioners of Turnpike Roads to be transmitted to the Secretary of State, and afterwards laid before Parliament. [28th August, 1833.]

**CAP. 81.**—An Act to authorize the Application of Part of the Land Revenue of the Crown for providing Fixtures, Furniture, Fittings, and Decorations for Buckingham Palace. [28th August, 1833.]

**CAP. 82.**—An Act to allow the People called Separatists to make a solemn Affirmation and Declaration instead of an Oath. [28th August, 1833.]

S. 1. The Dissenters called Separatists permitted, in any case where by law an oath may be required, to make instead the solemn affirmation or declaration set forth in the act, which is to be of the same force as an oath.

S. 2. Persons making such affirmation, who are not in fact Separatists, or wilfully affirming what would, if sworn, have amounted to perjury, to incur the penalties of perjury.

**CAP. 83.**—An Act to compel Banks issuing Promissory Notes payable to Bearer on Demand to make Returns of their Notes in Circulation, and to authorize Banks to issue Notes payable in London for less than Fifty Pounds. [28th August, 1833.]

**CAP. 84.**—An Act to provide for the Performance of the Duties of certain Offices connected with the Court of Chancery, which have been abolished.

S. 1. Reciting 2 & 3 Wil. 4, c. 111, whereby certain offices in the Court of Chancery were abolished from 20th August 1833, with a proviso that it should not determine those held by persons appointed before 1st June 1832, until their deaths or resignations, and that all the persons holding those offices, except the Clerk of the Patents, were appointed prior to 1st June, 1832: enacts, that after the death, resignation, or removal of the present Clerk of Custodies of Idiots and Lunatics, the duties shall be performed by the Secretary of Lunatics.

S. 2. The duties of Chaff-wax and Sealer in like manner to be performed by the Pursebearer, and those of Clerk of Presentations and Clerk of Dispensations and Faculties by the Secretary of Presentations.

S. 3. The Clerk of the Crown in Chancery, and Clerk of the Patents, to be nominated by the crown as vacancies occur.

S. 4. Appointment of salaries.

S. 5. Duties of office of Clerk of the Hanaper, on vacancy, to be performed by the Clerk of the Crown in Chancery, with additional salary of £200.

S. 6. Salaries to be in full satisfaction of duties.

S. 7. Fees to be paid 'into the Exchequer, and made part of Consolidated Fund.

S. 8. Salaries charged on Consolidated Fund.

S. 9. Clerk of Inrolments in Bankruptcy to be re-appointed, agreeably to 2 & 3 Wil. 4, c. 114.

CAP. 85.—An Act for effecting an Arrangement with the East India Company, and for the better Government of his Majesty's Indian Territories, till the 30th Day of April One Thousand Eight Hundred and Fifty-Four.  
[28th August, 1833.]

CAP. 86.—An Act to provide for the Payment of certain Grants and Allowances formerly paid out of the Civil List Revenues.  
[28th August, 1833.]

CAP. 87.—An Act for remedying a Defect in Titles to Messuages, Lands, Tenements and Hereditaments allotted, sold, divided, or exchanged, under Acts of inclosure, in consequence of the award not having been inrolled, or not having been inrolled within the time limited by the several Acts; and for authorizing the Appointment of new Commissioners in certain Cases where the same shall have been omitted. [28th August, 1833.]

CAP. 88.—An Act to continue for Seven Years, and from thence to the end of the then next Session of Parliament, an Act of the Fifty-ninth Year of King George the Third, for facilitating the Recovery of the Wages of Seamen in the Merchants' Service. [28th August, 1833.]

CAP. 89.—An Act to authorize the Issue of a Sum of Money out of the Consolidated Fund, towards the Support of the Metropolitan Police.  
[28th August, 1833.]

CAP. 90.—An Act to repeal an Act of the Eleventh Year of His late Majesty King George the Fourth, for the lighting and watching of Parishes in England and Wales, and to make other Provisions in lieu thereof.  
[28th August, 1833.]

CAP. 91.—An Act for consolidating and amending the Laws relative to Jurors and Juries in Ireland. [28th August, 1833.]

CAP. 92.—An Act to explain and amend the Provisions of certain Acts for the erecting and establishing Public Infirmaries, Hospitals, and Dispensaries in Ireland. [28th August, 1833.]

CAP. 93.—An Act to regulate the Trade to China and India.  
[28th August, 1833.]

CAP. 94.—An Act for the Regulation of the Proceedings and Practice of certain Offices of the High Court of Chancery in England.  
[28th August, 1833.]

S. 1. Abolition of offices of master of the report office, entering clerks and entering registrars, clerk of the exceptions, and agent to the senior deputy registrar of the Court of Chancery.

S. 2. Six Registrars of the Court appointed: the present four deputy registrars and two entering clerks to be the six, and vacancies of all but the junior to be filled up by the registrar next in seniority, and the vacancy of the junior by the senior clerk in the office.

S. 3. Registrars to attend each of the three equity courts, in such order

and manner as the Lord Chancellor, together with the Master of the Rolls and Vice Chancellor, or one of them, shall direct by general order: in case of illness they may appoint a deputy, to be first approved by the judge on petition; if the appointment be omitted for two days, the judge to appoint.

S. 4. Six clerks to the registrars appointed; any vacancy to be filled up by the clerk next in seniority.

S. 5. Vacancy of sixth clerk to be filled up by the Lord Chancellor; the person appointed to be a solicitor or attorney, or to have served five years clerkship.

S. 6. Two assistant clerks to registrars appointed, to succeed in their turn to the office of junior clerk, but no clerk to be appointed to supply either of their places.

S. 7. Lord Chancellor empowered, if necessary, to increase the number of clerks in registrar's office to eight.

S. 8. An officer appointed, to be called "Master of Reports and Entries," to which office the registrars and six clerks are to be entitled to succeed, vacating their former office; if they decline, the nomination to be by Lord Chancellor; the said officer to receive and account for the fees heretofore receivable by the master of the report office, the entering clerks or entering registrars, and clerk of the exceptions.

S. 9. Appointment of Clerk of Reports, two Clerks of Entries, and ten Clerks of Accounts; vacancies in the latter to be filled up according to seniority, &c.

S. 10. Parties to be at liberty to take an office copy of so much only of any decree, order, report, or exceptions, as they may require: no recitals to be introduced in decrees unless by special order; and Lord Chancellor, &c. empowered to issue rules as to the form of decrees and orders.

S. 11. There shall be an officer called "Clerk of Affidavits," who shall perform all the duties of the registrar of affidavits; to have an assistant clerk; both to be appointed by the Lord Chancellor.

S. 12. The Clerk of Affidavits, on next vacancy in the office of patentee of the subpoena office, to perform the duties of that office.

S. 13, 14, 15. The masters in chancery alone to hear, in the first instance, interlocutory matters, as directed by general order, subject to appeal to the Lord Chancellor, Master of the Rolls, or Vice Chancellor; the order made on appeal to be final: the masters to have power to award costs.

S. 16. Masters in chancery to be hereafter appointed by the crown by letters patent.

S. 17. Each master to report yearly, within the first four days of Michaelmas Term, to the Lord Chancellor, the days and hours of his attendance, and to annex to such report a list of matters of every description then pending in his office.

S. 18. No person to be appointed chief clerk to a master, but a solicitor or attorney of five years' standing, or a junior clerk in the master's office for ten years.



S. 19. No person compellable to take or pay for copies in the master's office, and a copy of such part only of any document to be taken as may be wanted: but no costs of copies to be allowed, unless made in the master's office, or transcribed from a copy made therein, and taken by the party claiming to be allowed the costs, or made for the use of the master, the court, or the client.

S. 20. Masters, officers, and clerks, to hold their offices during good behaviour, and so long as they shall give their personal attendance.

S. 21. Hours of business in the several offices to be settled by order.

S. 22, 23. Lord Chancellor, with Master of the Rolls and Vice Chancellor, or one of them, empowered to make general orders for simplifying and settling the practice of the court, and to alter or annul the same.

S. 24, 25. Master of the Rolls (except the present) to determine motions arising in causes depending in the Court of Chancery.

S. 26. Solicitors or attornies appointed to offices under this act, to be struck off the rolls.

S. 27. Examiners of the Court of Chancery authorized to administer oaths to witnesses, and depositions to be taken in the first person.

S. 28. Vacancies in the six clerks' office not to be filled up until the number is reduced to two: fees of the reduced clerks to be paid into the suitors' fee fund.

S. 29. No clerk to be articulated to any sworn or writing clerk from the passing of the act to 1st May, 1834.

S. 30. Powers given to Lord Chancellor hereby, to be exercised by Lord Keeper or Lords Commissioners.

S. 31. New mode of issuing subpoenas, and fees thereupon.

S. 32. Annual sums paid to deputy registrars and their clerks, and the master of the report office and his clerks, to cease.

S. 33. Officers' salaries as specified in the schedule.

S. 34. Provision for proportionate parts of quarterly payments to be made to representatives of deceased officers.

S. 35. First payment to clerk of affidavits and his assistant.

S. 36. Provision in case of surplus or deficiency in suitors' fee fund account.

S. 37, 38. Table of fees to be settled and paid to fee fund account: allowance to master of reports and entries, clerks of entries, and examiners, for copying: table of fees to be laid before parliament (1½d. per folio.)

S. 39. Annual payments to masters in ordinary (£2500.)

S. 40. Allowance to copying clerks in master's offices (1½d. per folio.)

S. 41, 42. Officers or clerks not to take gratuities, on penalty of £500 and removal: offenders to be prosecuted by information or indictment.

S. 43. Lord Chancellor may order the reasonable expenses of the offices to be paid yearly.

S. 44. Lord Chancellor, &c. may diminish amount of fees.

S. 45, 46, 47. Provisions as to investment of surplus interest of suitors' fund.

S. 48. Lords of the Treasury may grant compensation to certain persons herein named, on certain conditions.

S. 49. Compensation to secretary of Master of the Rolls.

S. 50. Masters in chancery appointed after the passing of this act, not to be entitled to annuity for length of service.

S. 51, 52. Order for any payment of annuity to be hereafter made to any master in chancery, to contain the cause of making the same; and copy of such order to be laid before the House of Commons.

S. 53. Act to commence, as to office of clerk of affidavits, immediately on its passing; as to other matters, on 26th November 1833.

CAP. 95.—An Act to appoint additional Commissioners for executing the Acts for granting an aid by a Land-tax, and for continuing the Duties on Personal Estates, Offices, and Pensions. [28th August, 1833.]

CAP. 96.—An Act to apply the Sum of Six Millions out of the Consolidated Fund, to the Service of the Year one thousand eight hundred and thirty-three; and to appropriate the Supplies granted in this Session of Parliament. [29th August, 1833.]

CAP. 97.—An Act to prevent the selling and uttering of forged Stamps, and to exempt from Stamp Duty artificial Mineral Waters in Great Britain, and to allow a Drawback on the Exportation of Gold and Silver Plate manufactured in Ireland. [28th August, 1833.]

S. 1. Any two or more of the commissioners of stamps may license persons (not being distributors or sub-distributors) to deal in stamps, who shall give a bond not to sell or keep any stamps except those procured from the stamp office or distributors, or from some licensed person; such bond not to be liable to stamp duty; and the license to be revocable.

S. 2. The license to specify the party's name, place of abode, and shop, &c. wherein he is licensed to sell, and he not to sell elsewhere.

S. 3. No person to deal in stamps without such license; if doing so, or dealing at a place not specified in the licence, to forfeit £20; and if it appear that the stamps were forged, though it be not alleged in the proceedings, the penalty to be doubled: but nothing herein to exempt persons from the penal consequences of uttering forged stamps.

S. 4. Persons employed to engross instruments liable to stamp duty, may charge their employers for the stamps without a license.

S. 5. Licensed dealers in stamps to paint their names, &c. in front of their houses or shops, under penalty of £10: the name of one only of several partners to be sufficient.

S. 6. Penalty of £10 on unlicensed persons painting on their shops any words importing that they are dealers in stamps.

S. 7, 8. Allowance to be made for stamps in the possession of vendors at the passing of the act, on proof that they were then in their possession, and had been legally purchased: and also for stamps in the possession of licensed vendors dying or becoming bankrupt, or whose licenses are revoked, on similar proof.

S. 9, 10. Commissioners of stamps empowered to grant warrants to search and inspect the stocks of distributors of stamps and licensed dealers:

power of entry after demand of admittance : penalty for refusing in the execution of such warrants, or obstructing the officers, £50 : the officers to give an acknowledgment, if required, of the stamps seized, and the dealer entitled to have the genuine stamps returned, or be paid their amount.

S. 11. Licensed dealers having counterfeit stamps in their possession, liable to the penalties of selling forged stamps, unless it be proved that they were obtained from some distributor or licensed dealer.

S. 12. Persons knowingly having forged dies or stamps in their possession, or fraudulently affixing stamps got from any other instrument, or erasing names, dates, &c. with intent to use the stamps again ; or knowingly using any stamped paper, &c. on which such erasure has been fraudulently made, guilty of felony, and liable to be transported for life or any term not less than seven years, or imprisoned for not exceeding four nor less than two years.

S. 13. Houses, &c. of persons suspected of being concerned in the forging of dies or stamps, or in the commission of these felonious acts, may be searched under warrant of a justice, and the dies, &c. seized.

S. 14. Penalty on persons hawking stamps, £20 ; and the hawkers may be apprehended and taken before a justice.

S. 15. Justice may issue his warrant for seizing stamps suspected to be stolen or fraudulently obtained, and unless the party account satisfactorily for his possession of them, they are to be condemned, and delivered to the commissioners, and after six months destroyed.

S. 16, 17. Relate to the providing of new dies from time to time.

S. 18, 19. to the allowance of stamps thereby rendered useless.

S. 20. The duties imposed by 52 Geo. 3, c. 150, on artificial mineral waters, repealed.

S. 22. Commissioners of stamps empowered to appoint officers to take affidavits.

S. 23. Penalties imposed by this act recoverable in the superior courts by action or information : but commissioners may mitigate them, or stay proceedings on terms ; and pay the penalty, or part of it, to informer.

S. 24, 25. Any justice may determine, on summons, offences subject under this act to pecuniary penalties, on information by solicitor or officer of stamp duties : may commit for six months in default of payment : party may appeal to the next sessions : proceedings not to be quashed for want of form, or removed : and justice may mitigate penalties.

S. 26. Actions to be commenced within three months : venue to be local : one month's notice to be given : party may plead general issue, and tender amends.

S. 27. Construction of terms used in this act.

S. 28. Act to commence 11th October 1833.

CAP. 98.—An Act for giving to the Corporation of the Governor and Company of the Bank of England, certain Privileges for a limited Period, under certain Conditions. [29th August, 1833.]

CAP. 99.—An Act for facilitating the Appointment of Sheriffs, and the more effectual auditing and passing of their Accounts ; and for the more

speedy Return and Recovery of Fines, Issues, forfeited Recognizances, Penalties, and Deodands; and to abolish certain Offices in the Court of Exchequer. [29th August, 1833.]

S. 1. So much of 3 Geo. 1, c. 15 as gives the fees named in its schedule, and also 3 Geo. 1, c. 16, repealed.

S. 2. After the passing of this act, it shall not be necessary for sheriffs to sue out patent or writ of assistance, or make or pay proffers, or pass accounts in Exchequer.

S. 3, 4. Appointment of sheriff; clerk of the peace to enrol duplicate of warrant of appointment.

S. 5. Sheriff, within a month, to appoint an under-sheriff, and transmit a duplicate of the appointment to the clerk of the peace.

S. 6. Oaths to be taken by sheriff and under-sheriff.

S. 7. Prisoners and process to be turned over by sheriff, at the expiration of his office, to incoming sheriff, and no writ of discharge necessary.

S. 8, 9. Sheriffs' accounts to be audited by commissioners for auditing public accounts: and sheriffs going out of office (except those of Chester, Lancaster, and Durham,) to transmit accounts to commissioners: and sheriff of Westmorland to transmit such accounts yearly within two months after January.

S. 10. Oath or affidavit of sheriff may be taken before a judge, commissioner, or justice of peace.

S. 11. Bill of cravings to be settled by the treasury.

S. 12. Sheriffs relieved from chargeability for quit rents due to the crown, which are to be received by the commissioners of woods and forests.

S. 15, 16. Sheriffs not to be chargeable with pre-fines or post-fines; but this not to extend to county palatine of Lancaster.

S. 17 to 21. Relate to entry, payment, &c. of such fines.

S. 22. Part of stat. 22 & 23 Car. 2, c. 22, requiring fines, penalties, &c. to be certified and estreated into the Exchequer twice a year, repealed.

S. 23—31. Fines received by clerks of either House of Parliament; fines, penalties, recognizances, &c. imposed in K. B., C. P., or Exchequer, or by judges of assizes, clerks of market, commissioners of sewers; and deodands,—to be accounted for to treasury and commissioners of audit, and paid as treasury shall direct: unpaid fines in the superior courts to be estreated into the Exchequer on 1st day of every term: the oath for that purpose may be taken before a judge, commissioner, or justice of peace: and accounts of estreats to be transmitted to treasury and commissioners of audit.

S. 32—36 relate to levying and payment of fines, &c.

S. 37, 38. Act not to prejudice rights of corporate bodies, lords of manors, &c.: nor to affect the jurisdiction of the Court of Exchequer.

S. 39, 40.—Act not to affect rights of county palatines, or cities of London or Chester.

S. 41. Offices of Lord Treasurer's Remembrancer and his several subordinate officers; of Clerk of the Pipe and his subordinate officers; of clerk

of the estreats, surveyor of the green wax, foreign apposer and his deputy, and clerk of the nihilis, abolished.

S. 42, 43, 44. Compensation clauses.

S. 45, 46. Records and documents concerning duties of said offices to be transferred to king's remembrancer, and process and future proceedings issued and taken by him.

S. 47. Searches may be made and copies taken, which shall be available as heretofore.

**CAP. 100.**—An Act for the Relief of the Owners of Tithes in Ireland, and for the amendment of an Act passed in the last Session of Parliament, intituled “ An Act to amend Three Acts passed respectively in the Seventh and Eighth Years of the Reign of his late Majesty King George the Fourth, providing for the establishing of Compositions for Tithes in Ireland, and to make such compositions permanent. [28th August, 1833.]

**CAP. 101.**—An Act to provide for the Collection and Management of the Duties on Tea. [29th August, 1833.]

**CAP. 102.**—An Act to repeal certain penal Enactments made in the Parliament of Ireland against Roman Catholic Clergymen for celebrating Marriages contrary to the Provisions of certain Acts made in the Parliament of Ireland. [29th August, 1833.]

S. 1. So much of the Irish Acts, 6 Ann., 12 Geo. 1, 23 Geo. 2, 12 Geo. 3, and 33 Geo. 3, as makes it felony for Roman Catholic clergymen to celebrate marriages between Protestants, or between Protestants and Papists, repealed.

S. 2, 3. Nothing herein to extend to any proceedings, civil or criminal, already commenced; nor to affect any parts of the recited acts that repeal former acts; nor to give validity to any marriage ceremony not now valid, nor to repeal the law preventing the performance of the marriage ceremony by degraded clergymen.

**CAP. 103.**—An Act to regulate the Labour of Children and young Persons in the Mills and Factories of the United Kingdom. [29th August, 1833.]

**CAP. 104.**—An Act to render Freehold and Copyhold Estates Assets for the Payment of Simple and Contract Debts. [29th August, 1833.]

Freehold, customaryhold, and copyhold estates, not charged by will, to be in all cases assets in equity for the payment of simple contract and specialty debts; and the heir or devisee to be liable to the same suits as heretofore in the case of specialty debts in which the heirs were bound: but such creditors by specialty to come in before creditors claiming by virtue of this act.

**CAP. 105.**—An Act for the Amendment of the Law relating to Dower. [29th August, 1833.]

S. 1. Interpretation clause.

S. 2. Widows to be entitled in equity to dower out of equitable estates of inheritance in possession, other than estates in joint tenancy.

S. 3. Seisin not to be necessary to give a title to dower.

S. 4. No dower to be taken out of land absolutely disposed of by the husband in his lifetime or by his will.

S. 5. Partial estates, charges, debts, and incumbrances, to be valid against the right to dower.

S. 6. Dower to be barred by a declaration by deed that the widow is not to be entitled to dower out of the land.

S. 7. Widow not to be entitled to dower out of land of which the husband shall die wholly or partially intestate, when by his will, duly executed, he shall declare his intention that out of he shall not be entitled out of such land, or any of his land.

S. 8. Widow's right to be subject to any restrictions declared by the husband's will.

S. 9. Devise of any estate in the land to the widow to bar her dower, unless a contrary intention be declared.

S. 10. But not a bequest of personal estate, unless an intention to that effect be declared.

S. 11. Husband's agreement not to bar dower may still be enforced in equity.

S. 12. Legacies in bar of dower still to be entitled to priority.

S. 13. Dower ad ostium ecclesie, and ex assensu patris, abolished.

S. 14. Act not to extend to widows married, or wills, &c. made before 1st Jan. 1834.

CAP. 106.—An Act for the Amendment of the Law of Inheritance.

[28th August, 1833.]

S. 1. Interpretation clause.

S. 2. Descent shall always be traced from the purchaser (the person who last acquired the land otherwise than by descent); but the person last entitled to the land shall be considered the purchaser unless it be proved that he inherited it; and then the person from whom he inherited it to be considered the purchaser; and so on.

S. 3. When land shall be devised, by a testator dying after 31st Dec. 1833, to the heir, he shall take as devisee and not by descent; and a limitation by deed to the grantor or his heirs shall create a new estate by purchase.

S. 4. Where any person shall take by purchase under a limitation to the heirs or heirs of the body of the ancestor, made after 31st Dec. 1833, or under a similar limitation by will of a testator dying after that day, the descent shall be traced as if such ancestor had been the purchaser.

S. 5. Brother or sister shall trace descent through their parent.

S. 6. Lineal ancestor may be heir to his issue, in preference to collateral persons claiming through him; e. g., the father before the brother.

S. 7. No maternal ancestors, or their descendants, to inherit until all the paternal ancestors and their descendants have failed: so also male paternal and maternal ancestors, &c. to be preferred to female.

S. 8. The mother of the more remote male paternal or maternal ancestor, or her descendants, to be preferred to the mother of the less remote, or her descendants.

S. 9. Persons related by the half-blood may inherit; and the place of a relation by the half-blood in order of inheritance to be next after the

relation in the same degree of the whole blood, and his issue, where the common ancestor is a male, and next after the common ancestor where a female; so that the brother of the half-blood ex parte paternâ shall inherit next after the sisters of the whole blood ex parte paternâ and their issue, and the brother of the half-blood ex parte maternâ next after the mother.

S. 10. After the death of a person attainted before the descent to be traced through him shall have taken place, his descendants may inherit notwithstanding.

S. 11. Act not to extend to descents taking place on the death of any person before 1st Jan. 1834.

S. 12. Limitations made before 1st Jan. 1834, to the heirs of a person then living, to take effect as if this act had not been made.

---



COPY OF THE COMMISSION FOR THE CONSOLIDATION OF  
THE CRIMINAL LAW.

---

**WILLIAM IV.**, by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, To our trusty and well-beloved Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos, and John Austin, greeting : Whereas we have thought it expedient, for divers good causes and considerations, that a commission should forthwith issue for digesting into one statute all the statutes and enactments touching crimes, and the trial and punishment thereof, and also of digesting into one other statute all the provisions of the common or unwritten law touching the same, and for inquiring and reporting how far it may be expedient to combine both those statutes into one body of the criminal law, repealing all other statutory provisions, or how far it may be expedient to pass into a law the first mentioned only of the said statutes, and generally for inquiring and reporting how far it may be expedient to consolidate the other branches of the existing statute law, or any of them. Know ye, that we, reposing great trust and confidence in your zeal, ability, and discretion, have authorized and appointed, and by these presents do authorize and appoint you the said Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos, and John Austin, or any three or more of you, to digest into one statute all the statutes and enactments touching crimes, and the trial and punishment thereof, and also to digest into one other statute all the provisions of the common or unwritten law touching the same, and to inquire and report how far it may be expedient to combine both these statutes into one body of the criminal law, repealing all other statutory provisions, or how far it may be expedient to pass into a law the first mentioned only of the said statutes, and generally to inquire and report how far it may be expedient to consolidate the other branches of the existing statute law, or any of them; and for the better effecting the purposes of this our commission, we do by these presents give and grant to you, or any three or more of you, full power and authority to call before you, or any three or more of you, such persons as you shall judge necessary, by whom you may be the better informed on the subject of this our commission, and every other matter connected therewith; and also to call for, have access to, and examine all such official books, documents, papers, and records, as may afford the fullest information on the subject, and to inquire of and concerning the premises by all other lawful ways and means whatsoever. And we do hereby give and grant to you, or any three, &c., full power and authority, when the same shall appear to be requisite, to administer an oath to any person or persons whatsoever, to be examined before you, or any three, &c., touching or concerning the premises. And our further will and pleasure is, that you, or any three &c., do and shall, within the space of one year after the date of this our commission, or sooner if the same can reasonably be, certify to us in our Court of Chancery, or Parlia-

ment, under your hands and seals respectively, your several proceedings in this matter as the same shall be respectively completed and perfected, particularly how far it may be expedient to combine both the statutes so digested into one body of the criminal law, repealing all other statutory provisions; or how far it may be expedient to pass into a law the first mentioned only of the said statutes, and generally how far it may be expedient to consolidate the other branches of the existing statute law, or any of them; and we will and command, and by these presents ordain, that this our commission shall continue in full force and virtue, and that you our said commissioners, or any three &c., may from time to time proceed in the execution thereof, and of every matter and thing herein contained, although the same be not continued from time to time by adjournment: And we do hereby direct and appoint that you, or any three &c., may have liberty to certify your several proceedings from time to time to us in our said Court of Chancery, as the same shall be respectively completed and perfected: And we hereby command all and singular our justices of the peace, sheriffs, mayors, bailiffs, constables, officers, ministers, and all other our loving subjects whatsoever, as well within liberties as without, that they be assistant to you and each of you in the execution of these presents: And for your assistance in the due execution of this our commission, we have made choice of our trusty and well-beloved James Lonsdale, gent., to be Secretary to this our commission, whose services and assistance we require you to use from time to time as occasion shall require.

In witness whereof we have caused these our letters to be made patent. Witness Ourselves at Westminster, the 23rd day of July, in the fourth year of our reign.

By Writ of Privy Seal.

BATHURST.

**NOTICE OF THE LIFE OF THE RIGHT HONOURABLE SIR CHRISTOPHER ROBINSON, D.C.L. JUDGE OF THE HIGH COURT OF ADMIRALTY.**

SIR Christopher Robinson was born in the year 1766. His father, the Rev. Christopher Robinson, D.D. held the livings of Abbury in Oxfordshire, and of Witham, Berkshire, to which he had been presented by the Earl of Abingdon, upwards of forty years, and died in 1802, at the age of eighty-four, having lived long enough to see his son in the possession of wealth and eminence. Young Christopher was matriculated at Magdalen, Oxford, of which college Dr. Robinson had been a fellow in 1782, with the intention of graduating and entering into deacon's orders. To the displeasure of his father, however, he preferred Doctors' Commons to the church, and was admitted advocate in Michaelmas Term 1793. As one of nine children he was launched into the profession with no larger patrimony than a good library and a gift of twenty pounds. But his course was smoothed by the zealous patronage of Sir William Ashurst, one of the Puisne Judges of the King's Bench, an old friend of the family, who commended him to the notice of Sir William Scott. By the shrewd advice of that eminent lawyer he commenced a series of Reports in the High Court of Admiralty, in 1797, and continued them with laudable diligence till 1808. Strange to say, though the judges of those courts were the highest authorities on subjects of international law in Europe, there had previously existed no record of their decisions. In the preface to a more recent work, containing Reports of Decisions during the times of Sir George Hay and Sir James Marriott, the Civilians are compared to the Talmudists among the Jews, who only dealt in oral traditions or secret writings; and great praise is ascribed to Dr. Robinson for having 'drawn back the veil of the temple.' But the six volumes of Reports which he published have high intrinsic merits of their own, and contain the ipsissima verba of Sir William Scott. It is reported that he was most fastidious in the correction of his judgments, extending his revising care to the substitution of colons for semicolons, and to the nice poising of particles. The reader, however, who is too often compelled to read much bad reasoning in much bad language, is a considerable gainer by this particularity. He meets in these judgments with perfect models of judicial eloquence, and reads the most elaborate arguments conveyed in the most rich and classical diction, like apples of gold in a net-work of silver. This publication, which elicited the encomium of Lord Grenville in the House of Lords, is also illustrated with classical notes by the editor on the consequences of captivity among the Romans and the practice of ransoming prisoners of war, &c. Though unproductive in a pecuniary sense, and in some years attended with positive loss to the editor, they were of exceeding value to him in extending his connections. He had the year before (1796) advanced his fortune by a very happy marriage with Catharine, daughter of Ralph Nicholson, Esq., a gentleman of independent property at Liverpool and descended from an old family in Berkshire. In February 1805, nine years after his admission, he was promoted to the lucrative office of King's Advocate, and knighted. Many of the prize causes and captures, of which he had the management by virtue of his office, were of great importance to the public and attended with considerable private emolument, several of them realizing to him more than £1000. In 1812 he is said to have acquitted himself

exceedingly well in the conduct of a prosecution against the Marquis of Sligo, for enticing seamen and persuading them to desert from the king's service. It appeared that two of them had been intoxicated by the Marquis's servants at Malta, and inveigled on board his yacht; and when the vessel was searched, the Marquis of Sligo pledged his honour that they were not on board. The King's Advocate warmed into an orator (he was not one by nature) at this unworthy cheat, and the peer, being found guilty, was sentenced to pay a fine of £5000, and to be imprisoned four months in Newgate. In 1818, at the request of ministers, but contrary to his own inclination, he obtained a seat in Parliament for the close borough of Callington. His entrance into that arena, so fatal to legal fame, was made too late in life to offer much chance of escaping from the common lot of his tribe; and on two occasions only, and then with no signal success, did he break through his prudent rule, '*de pedibus ire in sententiam.*' On the dissolution of Parliament, in 1820, he was again returned for Callington at the instance of government; but a petition being presented against the return, and bribery having been proved against his agents (he had not himself visited the borough), he was unseated, and saddled with an expense of £5000. The Premier had, indeed, promised to reimburse him, but he was too high-minded to stand like an importunate suitor at the door of the treasury, and the promise was never redeemed. Sir Christopher Robinson succeeded Lord Stowell in the offices of Chancellor of the Diocese of London and Judge of the Prerogative Court and Court of Peculiars, on the presentation of the Archbishop of Canterbury and Bishop of London. He trod in the path of his predecessor, it will readily be admitted, '*haud passibus æquis,*' but emulated with success his patient diligence and ever-watchful accuracy in determining the grave and delicate questions of marriage and divorce. Owing to the increasing infirmities of Lord Stowell, he undertook for several years to transcribe and read in court the decrees of that venerable judge, and at length, on his retirement in 1827, was called upon with the unanimous approval of the civilians to fill the vacant seat in the Court of Admiralty. It would be unfair to contrast the talents and acquirements, which he displayed in this situation, with those of his distinguished friend. The most illustrious judges of that court, Sir Julius Cæsar, Sir Harry Vane, and Sir Leoline Jenkins, must one and all veil the head to Lord Stowell. The panegyric pronounced on Jenkins may be applied to him with at least equal truth. "He had most, if not all, the qualities and ornaments that are desirable in those who sit in the seat of justice. No man could acquit himself better, and but few so well. If he received any credit from his station, his station received as much from him, and, as it were, only reflected back again the lustre it received from him." Sir Christopher presided over the Admiralty Court in a period of profound peace, when there were no cases of momentous interest involving the credit of the flag of England and the polity of nations, such as are wont to present themselves in a time of war. They consisted chiefly of claims of salvage, and mariner's wages, and construction of the Pilot Act, and to what officer properly belong the royal fish described by charter, to wit, "sturgeons, grampusses, whales, porpoises, dolphins, riggs, and graspes, and generally whatever other fish, having in themselves great and immense size, or fat!" Such topics do not require much research or legal acumen, but all that was requisite they obtained at the hands of this pains-taking judge. His mental energies were of late, in some degree, dulled by a disease, which proved to be an effusion of water on the brain, and terminated fatally on the night of Sunday, April 21st, 1833. He had complained of indisposition, which

was attributed to the prevailing influenza, and retired to rest a few hours before his death, in the full expectation of being able on the morrow to resume the duties of his office. He had attained his sixty-seventh year. His remains were interred in the church-yard of St. Benedict, Doctors' Commons.

The conduct of Sir Christopher Robinson, in his public capacity, may be summed up in the short sentence that he was '*par negotiis neque supra.*' It would be idle to dilate on his unbending integrity and unwearied diligence, for these are the attributes of an English judge. But a short notice of his domestic virtues must not be omitted. A thorough English gentleman, in mind and in manners, endowed with a graceful presence and a pleasing address, though slightly shaded by reserve, he carried into private life the same mild and conciliating demeanor which characterized him on the bench. Those who have made an excursion to his seat at Beddington, near Croydon, or have seen him in the company of such friends as the Bishop of Exeter and Sir John Nicholl, will bear witness to the cheerfulness and playful activity of his social hours. They will recall with subdued pleasure the

*Morum dulce melos et agendi semita simplex ;*

and review with memory's eye what once endeared him to them, the

*" Os placidum, moresque benigni ;*

*Et venit ante oculos, et pectore vivit imago."*

Ardently attached to the Church of England by conviction, independently of hereditary and parental prepossessions, he lived up to the doctrines of her communion ; nor could the solemn form of words with which the sentence of the Admiralty Judge is prefaced, proceed from any lips with more peculiar fitness than from his : " Thrice calling on the name of Christ, and having the fear of God alone before his eyes, the judge pronounces and decrees." His politics were of that old Tory school, which, exiled from the court and city, finds yet a safe asylum in the penetralia of Doctors' Commons. Notwithstanding that he filled the office of King's Advocate (a lucrative office in war time) for the period of twelve years, and lived in comparative seclusion, he has died far from rich ;—a strong proof that in the courts of civil law, at least, (if in any court) the judge is not overpaid. The fluctuating nature of his income was commented on with deserved severity by the present Lord Chancellor, then Mr. Brougham, in his far-famed speech on the state of the law. " The Judge of the Court of Admiralty, who has the highest situation, or almost the highest, among the judges of the land, (for there is not one of them who decides upon questions of greater delicacy and moment, in a national view, or involving a large amount of property,) this great dignitary of the law has £2500 a year salary only. The rest of his income is composed of fees, and these are little or nothing during peace. But then in time of war they amount to 7 or £8000 per annum. I profess not to like the notion of a functionary who has so many calls as the Judge of the Admiralty Court for dealing with the most delicate neutral questions—for drawing up manifestos, and giving opinions on those questions, and advising the crown in matters of public policy bearing on our relations with foreign states ;—I like not, I say, the notion of such a personage being subject to the dreadful bias (and here again I am speaking on general principles only, and with no personal reference whatsoever,) which he is likely to receive from the circumstance of his having a salary of £2500 per annum only, if a state of peace continue, and between 10 and £11,000 a year if it be succeeded by war. I know very well, Sir, that no feeling of this kind could

possibly influence the present noble lord of that court; but I hardly think it a decent thing to underpay him in time of peace, and still less decent is it to overpay him at a period when the country is engaged in war. I conceive that it may not always be safe to make so large an increase to a judge's salary dependant upon whether the horrors of war or the blessings of peace frown or smile upon his country, to bestow on one eminently mixed up with questions on which the continuance of tranquillity, or its restoration when interrupted, may hinge, a revenue conditioned on the coming on and endurance of hostilities."

It may be remarked, in passing, that the income actually received, after deducting fees, is not more than £2200 a year, a sum obviously inadequate to the dignity of the office and the rank of privy councillor, which it comprehends. As, however, a Committee of the House of Commons is now investigating the subject, we may confidently hope that the present excellent judge will be shortly in the enjoyment of a fixed stipend, independent of fees, and freed from the contingent mischief.

The work which has been already referred to, proves that the subject of this brief notice was a good classical scholar and well versed in modern languages. He published, in addition, "A Report of the Judgment of the High Court of Admiralty on the Swedish Convoy, pronounced by Sir W. Scott, June 11th, 1790:" "A Translation of the chapters 273 and 287 of the *Consolato del mare*, relating to the Prize Law, 1800;" and "Collectanea Maritima, being a collection of public instruments tending to illustrate the History and Practice of Prize Law, 1801."

By his wife, Lady Robinson, a most estimable and highly accomplished woman, whom he survived two years and upwards, he had a family of five children. These survive him: three sons, Christopher and John, clergymen, and William, an advocate of Doctors' Commons, and two daughters, one, Catherine, married to the Rev. Edmund Leigh, and Helen unmarried.

---

## EVENTS OF THE QUARTER.

A GLANCE at our Abstract of Statutes will show the amount of legal reform which has been consummated since the publication of our last Number. The following extract from the King's Speech, at the conclusion of the session, affords the best evidence of the spirit to which both what is done and what is doing, is attributable :

" I observe with satisfaction, that the amendment of the law has continued to occupy your attention, and that several important measures have been adopted ; by some of which, titles to property have been rendered more secure, and the conveyance of it more easy ; while, by others, the proceedings in courts, both of law and equity, have been made more expeditious and less costly.

" The establishment of the Court of Privy Council is another improvement, which, while it materially assists suitors at home, will, I trust, afford substantial relief to those in my foreign possessions.

" You may rest assured, that there is no part of your labors which I regard with deeper interest than that which tends, by well-considered amendments of the law, to make justice easily accessible to all my subjects.

" With this view, I have caused a commission to be issued for digesting into one body the enactments of the criminal law, and for inquiring how far, and by what means, a similar process may be extended to the other branches of our jurisprudence.

" I have also directed commissions to be issued for investigating the state of the municipal corporations throughout the united kingdom.

" The result of their inquiries will enable you to mature those measures which may seem best fitted to place the internal government of corporate cities and towns upon a solid foundation in respect of their finances, their judicature, and police."

The measures by which titles to property are supposed to have been rendered more secure, and the conveyance of it more easy, are the bills founded on the Real Property Reports, and we see little reason to doubt that his Majesty has formed a correct estimate of their consequences. The most striking of the measures by which proceedings in courts have been made more expeditious and less costly, is the Law Amendment Act, which we would also refer to as justifying a hope that we shall hear no more of Local Court Bills for some time to come. The 17th section of this act provides, that, where the debt or demand indorsed on the writ of summons does not exceed £20, the court or one of the judges, if satisfied that the trial will not involve any difficult question of fact or law, may order the issue to be tried before the sheriff of the county where the action is brought or any judge of any Court of Record (in cities or boroughs, for instance) for the recovery of debt in such county. Under this clause, all the good attainable by Lord Brougham's last bill will be attained with hardly any of the attendant inconveniences and expense. Indeed, there is a striking superiority in two respects : 1. We all know that questions the most complex and embarrassing may arise in actions for sums not exceeding £20 in amount ; now these under the above section will be distinguished and retained for decision in the courts above, whereas [Lord Brougham's bill, sweeping like a drag-net, allowed of no distinctions at all. 2. As the issue may be sent to be tried, not merely before



the sheriff, but before any judge of any Court of Record for the recovery of debt in such county, and as there are few cities or boroughs of any consequence without such a court, it is obvious that a trial may in general be much more speedily had, than if the issue could only be tried before a district judge, who, as will appear upon calculation, could only make two, or at the utmost three, circuits in the year. We see from the provincial papers, that the sheriffs of several counties have already fixed monthly sittings for the hearing of such issues as may be sent to them.

Another important act, the judicious application of which will greatly lessen the expenses and delays of assizes, is the act entitled the Assizes Adjournment Act, investing the government with full power to direct in what places assizes shall be held, to divide counties for the purpose of holding assizes in different divisions of the same county, and to direct them to be holden in more than one place in a county on the same circuit.

The Privy Council Appeal Act, though not in all respects precisely such as could be wished, does certainly hold out an expectation that Indian appeals will be cleared off a little more expeditiously than heretofore. The two sections from which we hope most, are the 22nd, enabling the court to bring Indian cases to a hearing, even though the proper steps should not have been taken by the parties, who generally are not aware that any thing beyond a bare appeal for justice is required; and the 30th, which secures the constant attendance of two retired Indian judges, who are to be paid £400 a year each, upon the court, the more particularly as we find that Sir Alexander Johnstone, a judge of approved zeal and distinguished ability, is to be one of them.

According to an authority, which may almost be deemed official, this act is only the forerunner of far greater things: "But there is another, and a far more important question connected with this subject, namely, the promise which this Reform holds out that ere long the constitution of the highest Court of Appeal will receive that consideration, and undergo that improvement, which its present constitution so urgently demands. It is but reasonable to suppose that the same views and the same spirit which induced the present ministry to propose and perfect this amendment, will not be backward in giving efficiency and perfection to the court which is the highest known to the constitution, and that this Reform of the appellate jurisdiction of the Privy Council will lead to the establishment of a well organized and efficient Court of Appeal instead of that now existing, which is in fact, in nine cases out of ten, an appeal to a single judge, (and not seldom from his own decisions,) assisted only by a bishop and a lay lord attending under penalty, and according to a rota." \*

---

\* *The Reform Ministry and the Reformed Parliament. Seventh Edition*, p. 68. This pamphlet is understood to be the joint production of some four or five gentlemen attached to the ministry. The Quarterly Review remarks upon it thus: "The great head of the Law, dissatisfied with the little notice that he had lately received is understood to have done the chapter of Legal Reform with his own hand—or with one of the many hands, which, by dint of patronage, he has made his own—and, indeed, it has been shrewdly suspected, that the whole pamphlet was got up for the sake of this chapter, just as we remember to have heard that an ingenious gentleman published an entire Peerage for the sake of introducing his own claims to a dormant title. Be that as it may, this pamphlet is avowedly the Smectymnus of the ministry, and although it is such as (to use

A step has also been made in Chancery Reform, and according to the writers just quoted, it was no fault of the chancellor's that more was not effectuated. "The Lord Chancellor brought a bill for the reform of his court into the House of Lords early in the session. Such a bill could not fail to call forth the opposition not only of all the officers whose interests were to be affected by it, but also that of former Lord Chancellors, who, having themselves suffered the existence of the evils without an attempt to correct them, could not look without jealousy on a proceeding of their successor calculated to afford to the suitors that benefit which under the rule of his predecessors had been so long withheld from them.

"The bill was accordingly referred to a select committee, where the examination of witnesses lasted several weeks, and would probably have been continued to the end of the session, as the only means of defeating the measure, had not the Lord Chancellor, to avoid this evil, entered into a compromise with his opponents by postponing part of his plan to the next sessions; thus mutilated, the bill descended to the Commons, and after it had undergone the ordeal of another committee there, was passed amidst the cheers of the whole House."

We are not prepared to say that this account of the opposition encountered by the Chancellor is untrue; but we know that when he brought in his Bill he had made none of the requisite preparations for carrying it entire, and that, considering the advanced state in which he found the question of Chancery Reform on his accession to office, he has done about as little towards forwarding it as it was well possible for a Chancellor to do. On this subject, as on most others, he has of late shown neither inclination or capacity for any thing but talk. Our opinion of his recently revived project for relieving himself from the judicial duties of his station, has been already given, and we see no reason for altering it.

It is amusing to find these writers enumerating amongst the good deeds of the present ministry, the General Register Bill, which was lost through their lukewarmness—which indeed Lord Althorp expressly refused to support as a government measure, and the Bill for the abolition of imprisonment for debt, which the Solicitor General withdrew under a poor pretence which was false upon the face of it. He stated that he was obliged to withdraw the measure in consequence of the failure of the Local Court Bill, by which an important part of the requisite machinery was to be supplied. Now Lord Brougham had stated again and again that his Bill was merely intended as an experiment to be tried only in two or three counties at first, whilst the Solicitor General's Bill was beyond all doubt intended for general application immediately. The inference is unavoidable; either the Solicitor General was guilty of an almost ludicrous mistake, or the Lord Chancellor really did intend to exert the powers his bill should vest in the government to the full, at the very moment he was disavowing all intentions of the sort.

A writer in *Fraser's Magazine* terms the present government a government by commissions, and Lord Brougham at least seems resolved on doing what in him lies to justify the appellation. His last exploit in this department, according to the newspapers, is the appointment of a commission to revise and assimilate the law of debtor and creditor throughout these realms. This (if true) is a palpable job. The common law commissioners have given this branch of law their fullest con-

---

Milton's expression in the Smectymnian controversy,) might have been written with another man's left hand,—we firmly believe it exhibits all the skill and judgment which its synod of authors were able to command."

sideration, have written an elaborate Report upon it, and in the appendix to that Report have brought together every species of information, both foreign and domestic, to which it can be necessary to refer. To them therefore, men of acknowledged learning and experience, the task would be a comparatively easy one, and it is to be hoped that the Lord Chancellor will be called upon to explain in parliament, why he prefers commissioning, and making the country pay, a fresh set of gentlemen to go through the same course of inquiry again.

At the same time that this petty sort of commission is multiplying, the labours of the Common Law and Real Property Commissioners are said to be drawing towards a close for want of government support. We understand that neither commission is to be paid after the present year, and that the Real Property Commission is not even to be paid for the last. The utmost, therefore, to be hoped for is, that they will go on and report gratis on the subjects now before them; i. e. that the Common Law Commissioners will report on calls to the bar, and the law of evidence and costs, and that the Real Property Commissioners will report on assets and alienation. All the other subjects which the law-reform controversy has stirred up, are to be left in statu quo, with their imperfections rendered more glaring by contrast with those parts of the system which have been changed. It would have been much more creditable to Lord Brougham never to have called for these commissions at all, than first to set them going, and then suffer them to become inefficient in this manner. We undertake to say, that they have already saved the country fifty fold the amount of their cost. At the same time, we are not prepared to deny that their numbers, particularly that of the Real Property Commissioners, might be advantageously reduced.

Nothing has yet transpired as to the course which the Commissioners named to report on the Criminal Law will pursue. We are sorry to see that this commission most injudiciously connects the question as to the propriety of digesting the Criminal Law with the general question of Codification, than which few questions can be more essentially distinct.\* The commission, it is true, is in terms confined to statute law, but statute law and common law are now too much interwoven for either to be considered apart.

We stated in our last Number, that two Lectureships were about to be established by the Benchers of the Inner Temple. The formal resolution, since made public, runs thus :

“ Resolved, that two lecturers be appointed to deliver lectures in the Hall of the Society, in and after the ensuing term.

“ That the principle of law administered in the superior Courts of Common Law and Equity in England, do form the subject of the lectures to be delivered by one of such lecturers.

“ That the general principles of jurisprudence and international law, do form the subject of the lectures to be delivered by the other of such lecturers.

“ That one lecture in each class be delivered weekly, except in the long vacation, and in the vacations at Christmas and Easter.

“ That the under treasurer be directed to receive the applications of barristers members of the society who may be desirous to be appointed lecturers.”

This manifests an improving spirit in the bench, and looks as if they were beginning to find out that their rights and privileges partake of the nature of a trust ;

---

\* On this subject see some excellent remarks by Rossi—*Traité De Droit Pénal*, Tom. 3; Liv. 4.

but we are sorry to say that complaints are constantly reaching us of their selfish mode of regulating the library. For instance, many of the books most in request are locked up in their own private chamber, and are not to be had for even temporary reference without a special written order from a benchers.

General opinion points to Mr. Austin as the fittest person to fill the situation of Lecturer on Jurisprudence and International Law, and we hope the benchers will leave no means untried of securing his services.

Mr. Spurrier has been appointed Law Professor at King's College, and will commence a course of lectures on the 5th of November. The following gentlemen have been appointed lecturers at the Law Institution: Mr. Wilde, for conveyancing; Mr. Dodd, for Common Law; and Mr. H. N. Coleridge, (who has already distinguished himself as a lecturer at King's College) for Equity. Mr. Theobald will take the Common Law department during the temporary illness of Mr. Dodd. Mr. Amos will lecture as usual at the London University; but no course by Mr. Austin is announced.

Attempts are making in the city to establish some new description of court, over which, it is rumoured, Mr. M. D. Hill is to preside. The present plan seems to be to melt the two Sheriffs' Courts into one, entirely free from monopoly. For this purpose an Act of Parliament will be applied for early in the next session. We shall have more to say as to this project and its originators, if it goes on.

We mentioned in our last number that a select committee had been appointed to report on the Admiralty and Prerogative Courts, and that the civilians were actively bestirring themselves to preserve the largest possible share of practice to themselves. Thus far their endeavours have prospered; the committee have reported in favour of a Court at Doctors' Commons, to which all testamentary business shall be referred. We shall review their reasons for this recommendation in our next number.

Our foreign letters are meagre in legal intelligence. One law, however, has recently been passed in France which ought to interest the English reader, as it is closely copied from our own. We allude to the law *Sur l'expropriation pour cause d'utilité publique*. Before the passing of this law, when the property of an individual was wanted for public purposes, the amount of compensation was fixed by the courts under the advice of experts; henceforth it will be fixed by a jury of twelve, as in England. This law is also remarkable as being the first introduction of juries in matters of a civil nature in France.

Of new French law books, the one most likely to interest foreigners is a new collection of *Causes celebres, anciennes et modernes*, intended to comprise the substance of all former collections, of which some volumes have already appeared.

We have also received *Observations sur La Charte Constitutionnelle de la France*, by M. Pinheiro, whose valuable work on Public Law we formerly mentioned; and a remarkably able and well-written Memoir by M. Fœlix, entitled *Mémoire Relatif aux Débats élevés devant les Tribunaux au Sujet de l'interdiction de S. A. Le Duc Charles de Brunswick*, in which a great deal of useful information as to the public law of Germany and the relations of Hanover is compressed. In Germany, Dr. Blume, the author of the *Iter Italicum*, has just published a work of great learning and research, entitled, *Lex Dei, sive Mosaicarum et Romanarum Legum Collatio*.

**NOTICE TO CORRESPONDENTS.**

We thank a *Solicitor* for his communication; but he is wrong in blaming Lord Brougham, who had nothing at all to do with drawing or carrying the Real Property and Law Amendment Acts. We also refer our correspondent to pp. 300, 301 of this number.

In answer to a letter signed D. and dated Liverpool, our opinion is that the revising barrister was right.

The communication of Mr. H., of P. is under consideration.

A revising barrister requests us to protest against the reports of revising barristers' decisions which have appeared in the provincial newspapers. To the best of our belief, no reliance whatever is to be placed upon them; country reporters having little (if any) of that impartiality and discrimination which distinguishes reporters in town.

LIST OF NEW PUBLICATIONS.

The Real Property Statutes of the 2 & 3 and 3 & 4 Wm. IV., including those for the Limitation of Actions and Suits, the Abolition of Fines and Recoveries &c. with Explanatory Notes. By Leonard Shelford, Esq. of the Middle Temple, Barrister at Law. In 12mo. price 7s. boards, pp. 276.

[We intend reviewing together all the Commentaries on these Statutes. For the present we only think it necessary to say that none of those hitherto published appear to us to be executed as they ought to be. There is a general expectation that these Acts will be edited by one of the Commissioners.]

The Laws relating to the Poor; being a Supplement to the Sixth Edition of Bott's Poor Laws, as well as to the Fourth Edition of Nolan's Treatise on the same subject, including all the Cases and Statutes to the day of publication. By John Tidd Pratt, of the Middle Temple, Esq. Barrister at Law. In 8vo. price 15s. boards, pp. 372.

[A useful compilation, made with that care and precision for which all of Mr. Pratt's publications are remarkable.]

Acts relating to the Law of Real Property, passed in the last session of Parliament; also the Act for the Further Amendment of the Law, with Notes and an Index. By S. Atkinson, Esq. Barrister at Law. In 8vo. price 6s. boards, pp. 139.

The Act for the Further Amendment of the Law (3 & 4 Wm. IV. c. 42) with Notes, Critical and Explanatory; also the Interpleader Act, (1 & 2 Wm. IV. c. 58,) with Notes, and all the Cases. By William Theobald, of the Inner Temple, Barrister at Law. In 12mo. price 2s. sewed, pp. 68.

The recent Statutes relating to Prescription and Custom, Moduses and Compositions for Tithes, the Limitation of Real Actions, Fines and Recoveries, Dower, Descents, and the Payment of Debts out of Real Estate; with Introductions, Abstracts, Tables, and Notes. By George James Berrey, of Lincoln's Inn, Barrister at Law, in 12mo. price 5s. boards, pp. 244.

The Statute 3 & 4 Wm. IV. c. 42, entitled an Act for the Further Amendment of the Law, and the Better Advancement of Justice, with Notes. By Charles James Gale, Esq. of the Middle Temple, Barrister at Law, in 12mo. price 3s. 6d. boards, pp. 96.

A Collection of all the General Rules for regulating the Practice of the Superior Courts, with a Copious Index. By Coard William Squarey, Solicitor. In 12mo. price 3s. 6d. boards, pp. 71.

Proposal for an Act for facilitating Deeds of Composition, &c., with an outline of the Act suggested, and an Analysis of a Deed of Composition. By Scrope Ayrton, Esq. Barrister at Law. pp. 15.

[An ingenious suggestion for facilitating a very important object.]

A Treatise on Copyhold, Customary Freehold, and Ancient Demesne Tenure, with the Jurisdiction of Courts Baron and Courts Leet. By John Scriven, Esq.

Serjeant at Law. Vol. 1. The third Edition, incorporating all the late Cases on the above subjects ; also, an Appendix, containing Rules for Holding Customary Courts, Courts Baron and Courts Leet, Precedents of Court Rolls, Deputations, and Copyhold Assurances, and the Relative Acts of Parliament. In royal 8vo. price 2l. 10s. boards.

An Essay on the Law of Bailments, by Sir William Jones, Knt. late one of the judges of the Supreme Court of Judicature at Bengal. The fourth Edition, with Notes, on the Law relating to Carriers, Innkeepers, Warehousemen, and other Bailles, and an Essay on the Law of Coach Proprietors and Carriers, by William Theobald, of the Inner Temple, Esq. Barrister at Law, in 8vo. price 9s. boards.

[A much improved edition. Mr. Theobald, with a candour which does him great honour, ascribes the entire merit of it to Dr. Story, the distinguished American, from whose work on Bailments, he says, almost all his notes have been taken.]



## INDEX TO VOL. X.

---

### A.

- ADMIRALTY AND PREROGATIVE COURTS**, Report of Select Committee upon, 252, 493.
- American Penitentiary System**, Report of the French Commissioners relating to, 113.
- account of the American Prisons, 115.
- advantages of the system, 119.
- mode of governing the Penitentiaries, 122.
- the two methods pursued in America, of solitary labour, and silent labour in company, compared, 124.
- effects in the reformation of convicts, 129.
- expense, 132.
- Appeal**, Bill for establishing a new Court of, 253.
- Assizes Adjournment Act**, 490.
- Auburn Penitentiary**, account of the system of, 115, 123, et seq.

### B.

- Beaumont, M., and M. de Tocqueville**, work of, on the American Penitentiary System, reviewed and commended, 113.
- Brougham, Lord**, his Local Courts' Bill rejected, 252.
- other bills introduced by, ib.

### C.

- Chancery Regulation Bill**, 253, (and see Abstract of Statutes, cap. 94.)
- Chitty, Joseph**, his Practice of the Law, reviewed, 139.
- Cockburn, A. E., and W. C. Rowe**, their Election cases, 146.
- Commissioners appointed to investigate the state of the Criminal Law**, 254.
- copy of their commission, 485.
- Common Law and Real Property Commissions**, reported close of, 492.

Common Law Commissioners, Fifth Report of, on Local Courts, abstracted and commented on, 162, et seq.

Covenants running with the Land, the authorities relating to them collected and commented on, 342.

Cowper, Lord, Life of, 43.

his birth and family, *ib.*

his *liaison* with Miss Culling, 44.

called to the bar, *ib.*

returned to parliament, 45.

crown counsel in the State Trials of 1696, &c. *ib.*

his brother's trial for murder, 47.

defends Lord Somers in the House of Commons, 50.

made Lord Keeper, 51.

his impartiality and dispatch, 52.

created Baron Cowper, and declared Lord Chancellor, 56.

presides at Sacheverell's trial, 58.

resigns, 59.

his "Letter to Isaac Bickerstaff," 60.

in opposition to the Tory ministry, 62.

re-appointed Chancellor on Geo. I.'s accession, 64.

again resigns, 65.

his judicial character and merits, *ib.*

his speech on the South Sea Bill, &c. 68.

and in Atterbury's case, 70.

his death, 73.

and character, 75, et seq.

Criminals in London, different classes of, 261.

## D.

duelling, law of, in England, examined, 367.

origin of the custom of duelling, 368.

Montesquieu's observations thereon, 369.

Lord Bacon's hostility to the practice, 370.

trials of Bromwich and Oneby, 372, 373.

authorities of Foster, Hale, and Hawkins on the law of duelling, 374.

trials of Lord Mohun and Lord Byron, 375, 376.

relaxation of the law in practice, 377.

trial of Mr. Stuart for the murder of Sir A. Boswell, 378.

and of the parties concerned in the late duel at Exeter, 382.

Mr. Justice Patteson's excellent charge in that case, *ib.*

## E.

Election Law, new points of, on the Reform Act, 146.

conflicting decisions on the jurisdiction of the election committees, *ib.*

other points decided, 156.

## F.

Feuerbach, M., review of his Collection of Criminal Trials, concluded, 385.

## G.

Gaspar Hauser, mystery respecting, elucidation of, 403, note.

General Rules of the Common Law Courts, 426.

German Criminal Trials, M. Feuerbach's Collection of, reviewed, and further examples given, 385.

## H.

Harcourt, Lord, Life of, 296.

his family, birth, and education, *ib.*

returned to parliament on the Tory interest, 299.

his speeches in Fenwick's case, *ib.*

impeaches Lord Somers, 301.

made solicitor-general, 302.

draws the Union Act, 304.

his charges at the Buckinghamshire Quarter Sessions, 305.

attorney-general, 306.

displaced, *ib.*

his speech on being unseated for Abingdon, 307.

defends Sacheverell, 308.

re-appointed attorney-general, 311.

and lord keeper, *ib.*

the dissensions in the ministry, 312.

created Baron Harcourt, 314.

and declared lord chancellor, 315.

engaged in the Jacobite interest, 316.

his intrigues against Lord Oxford, 317.

removed on the accession of George I., 319.

remarks on his judicial character, *ib.*

his speeches in opposition, 320.

death of his son, 321.

gained over by Walpole, 322.

view of his private life, 323.

his intimacy with Pope, Swift, &c. *ib.*

solicits Bolingbroke's recall, 325.

his death and character, *ib.*

Harvey, D. W. his case, 253.

Homicide, law of, considered with reference to the Spa Fields' verdict, 79.

## K.

Knapp, J. W., and H. J. Perry, their Election Cases, 146.

## L.

- Law lectureships about to be established in the Inner Temple, 254.  
 formal resolution respecting, 492.
- Lee, Sir George, his judgments in the Ecclesiastical Courts, edited by Dr. Phillimore, review of, 327.  
 specimen of them, 329, et seqq.
- Limitation of Actions, act relating to, abstracted, with remarks, 357.
- Local Courts, Common Law Commissioners' Report on, 162.  
 Lord Brougham's bill for, rejected, 252.  
 rendered unnecessary by the Law Amendment Act, 489.

## O.

- "Old Bailey Experience," by the Author of "The Schoolmaster's Experience in Newgate," reviewed, 259.  
 his account of crime and criminals in the metropolis, 261, et seqq.  
 his criminatory description of the constitution and proceedings of the Old Bailey Court, 274.  
 and of the mode in which the prerogative of pardon is exercised, 279.  
 his remarks on the effects of punishment on the minds of malefactors, 282.  
 his praises of the transportation system, 285.  
 specimens of the writer's incoherent style and gross ignorance, 290, et seqq.

## P.

- Park, J. J., biographical notice of, 254.
- Penitentiaries in America, account of, 115.
- Perry, H. J., and J. W. Knapp, their Election Cases, 146.
- Phillimore, Dr., his edition of the Judgments of Sir George Lee, 327.
- Prescription and Custom, act relating to, abstracted, with remarks, 103.
- Privy Council Appeal Act, 490.

## R.

- Real Property Reports, acts founded on, passed in the last session, 489.
- Real Property Commissioners, Fourth Report of, on the Law of Wills, abstracted and commented on, 1—43.  
 mode of execution of wills, 2.  
 persons by whom they may be made, 9.  
 property which may be passed by wills, 10.  
 revocation, 12.  
 republication, 17.  
 probate, ib.  
 lapse, 30.  
 propositions appended to the Report, 35.

Registry Bill, debate on, 252.

Robinson, Sir Christopher, late judge of the Court of Admiralty, biographical memoir of, 48.

Rowe, W. C., and A. E. Cockburn, their Election Cases, 146.

S.

Sing-sing, prison of, account of its discipline, 122, 123.

Spafields Verdict, its illegality, 79.

power of the Court of King's Bench to quash it, 90.

Stuart, Mr., quotation from his "Three Years in North America," 129.

V.

Vesting of estates, authorities relating to, 96.

W.

Wills. See *Real Property Commissioners*.







Stanford Law Library



3 6105 062 669 655

